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A Comparative Analysis of the NFL's Disciplinary Structure: The Commissioner's Power and Players' Rights

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Cover Page Footnote

Notes and Articles Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXVII; J.D. Candidate, Fordham University School of Law, 2017; B.S., Business Management, Pennsylvania State University, 2014. I would like to first thank Professor James Brudney for all of his constructive feedback and his involvement throughout the writing process. I would like to thank the IPLJ XXVI Editorial Board, and Staff, especially Patrick O'Keefe, Kathryn Rosenberg, and Elizabeth Walker, for their constant guidance and accessibility whenever I had any questions or concerns. Lastly, and most importantly, I would like to thank my parents, Ed and Susan, and my brothers, Dylan and Jack, for their consistent encouragement and positive outlook, and for always being there when I need them the most.

A Comparative Analysis of the NFL's Disciplinary Structure: The Commissioner's Power and Players' Rights

Cole Renicker*

The power of professional sports commissioners to determine what is in the "best interests" of their respective sport is a significant aspect of sports today, and can be traced back to 1921, when the federal courts authorized then-Commissioner Kenesaw Mountain Landis to act with a broad range of discretion in protecting the "best interests" of baseball. This precedent set in motion a long history of commissioners using the "best interests" of the game power to accomplish various goals, and most recently has been used to discipline players for alleged misconduct. The Commissioner of the National Football League, Roger Goodell, has recently been criticized both for using this power to impose initial discipline, and also for using his power under Article XLVI of the NFL's Collective Bargaining Agreement to oversee appeals for punishment that he personally issues. This Note explores the power allotted to the NFL's Commissioner under the League's Constitution and Bylaws, the current Collective Bargaining Agreement, and the NFL's Personal Conduct Policy. It also examines the NFL Commissioner's power in hearing an

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appeal made by a player for any punishment that is imposed on him. In order to fully understand the power conferred on the NFL's Commissioner, this Note compares the power of the NFL's Commissioner to the powers of the Commissioners of Major League Baseball and the National Basketball Association. Additionally, this Note discusses the disciplinary power afforded to commissioners in non-sports settings, such as the New York City Police Department and management at Ford Motor Company, relative to the NFL Commissioner's disciplinary power. Ultimately, this Note proposes that the NFL Commissioner retains his current power to impose initial discipline, albeit with additional due process rights provided to the players, such as an opportunity to be heard. It then proposes to reconfigure the players' appeal rights, providing the players with an impartial, three-panel arbitration, which is agreed upon by both the NFL Management Council and the NFL Players' Association.

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INTRODUCTION

In any sort of labor context, where there is a hierarchy of employment characterized by varying levels of management and subordinate employees, the power to discipline is a bedrock principle that is crucial to maintaining order in the workplace.¹ This power, typically belonging to management, may take various forms and is justified in varying circumstances.² Much like other labor situations, the relationship in the National Football League (“NFL” or “the League”) between the owners (“Management”) and the Players’ Union is also impacted by the League’s power to discipline players who do not represent the League adequately.³

Given the popularity of sports and the instantaneousness of media coverage today, athletes live in an environment where they must be mindful of their actions at all times.⁴ With up-to-the-minute technology and cameras essentially everywhere, athletes are front and center in many American homes.⁵ Despite warnings against the idolization of athletes,⁶ people continue to view athletes as role models, due to both the nature of their profession and their vast exposure to the public.⁷

The concept of athletes as role models has paved the way for leagues and their respective governing bodies to impose discipline when athletes’ actions do not conform to the “best interests” of their league.⁸ It is no secret that professional sports leagues are

¹ See *Employee Discipline*, 16 ANDREWS EMP. LITIG. REP., no. 6, 2001, at 12.

² See *id.*

³ See *infra* Section I.C.

⁴ See Sean Bukowski, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 108 (2001) (noting that athletes are high-profile public figures, thus every aspect of their lives draws media attention).

⁵ See *id.*

⁶ Michael Rose-Ivey, *Athletes as Role Models? An Athlete Gives His Take*, KNOW IT ALL FOOTBALL (Feb. 28, 2014), <http://www.knowitallfootball.com/2014/02/28/athletes-role-models-athlete/> [<https://perma.cc/DX3N-R8MS>].

⁷ See Bukowski, *supra* note 4, at 108. For example, NFL games accounted for forty-five of the top fifty watched-programs during the course of its 2014–2015 season. Sarah Bibel, *NFL 2014 TV Recap: 202 Million Viewers, Game Viewership Nearly Triples Broadcast Primetime*, ZAP2IT: TV BY THE NUMBERS (Jan. 9, 2015), <http://tvbythenumbers.zap2it.com/2015/01/09/nfl-2014-tv-recap-202-million-viewers-game-viewership-nearly-triples-broadcast-primetime/348433/> [<https://perma.cc/9XYC-57TJ>].

⁸ Major League Baseball Collective Bargaining Agreement Art. XII.B (2012) [hereinafter 2012 MLB CBA]; see generally Jason M. Pollack, *Take My Arbitrator, Please:*

money-driven industries.⁹ Thus, when the leagues' governing bodies feel that their sport—and therefore, their product—is being devalued due to the poor conduct of their athletes, the governing bodies take action to curtail the bad behavior.¹⁰ Commissioners take punitive action against athletes primarily through either suspensions or fines, though outright banishments have also been handed out in particularly admonishing circumstances.¹¹ As a result, the athletes of today must be cognizant not only of their conduct on the field, but also of the people they surround themselves with, where they go, and what they do away from the stadium or arena.¹²

The threat of suspensions or fines has created an adversarial relationship between the players and the governing bodies in sports leagues such as the NFL, Major League Baseball (“MLB”), and National Basketball Association (“NBA”).¹³ For the NFL, this situation has landed at the doorstep of its Commissioner, Roger Goodell.¹⁴ During the NFL's 2015 season, fifty-nine players were suspended solely for their off-the-field conduct.¹⁵ Notably, that number is considerably higher than the number of players suspended

Commissioner “Best Interests” Disciplinary Authority in Professional Sports, 67 FORDHAM L. REV. 1645 (1999).

⁹ See Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1106–07 (2008); see also Tom Van Riper, *Thanks to Media, Sports Industry Growth Set to Accelerate*, FORBES: SPORTSMONEY (Nov. 13, 2013), <http://www.forbes.com/sites/tomvanriper/2013/11/13/thanks-to-mediasports-industry-growth-set-to-accelerate/> [https://perma.cc/N8UR-4YZF].

¹⁰ See, e.g., NFL Collective Bargaining Agreement Art. 46 § 1(a) (2011) [hereinafter 2011 NFL CBA].

¹¹ See, e.g., John Belaska, *10 Athletes Who Were Banned from Their Sports for Life*, RICHEST (May 25, 2014), <http://www.therichest.com/sports/10-athletes-who-were-banned-from-their-sport-for-life/> [https://perma.cc/29BG-758U].

¹² See Symposium, *From the Arena to the Streets—The Pressures Placed on Athletes, Entertainers, and Management*, 19 SETON HALL J. SPORTS & ENT. L. 381, 480–82 (2009).

¹³ See, e.g., Tom Pelissero, *NFLPA Boss DeMaurice Smith Says Roger Goodell Forcing Union to Use Courts*, USA TODAY (Sept. 4, 2015), <http://www.usatoday.com/story/sports/nfl/2015/09/04/smith-goodell-nflpa-brady-deflategate/71705650/> [https://perma.cc/EY6B-QN4H].

¹⁴ See *id.*

¹⁵ 2015 NFL Fines & Suspensions, SPOTRAC, <http://www.spotrac.com/nfl/fines-suspensions/2015/suspensions/> [https://perma.cc/6ZQH-Y4LG] (last visited Feb. 26, 2016).

solely for their off-the-field conduct in the years prior to 2011.¹⁶ A possible reason for the increase in player discipline is the NFL's current Collective Bargaining Agreement ("CBA"), which took effect in 2011.¹⁷

The current situation in the NFL is a peculiar one, because although the power to discipline exists in almost any workplace, the means by which punishment is imposed on NFL players, and the due process rights provided to players when they are punished, are not necessarily similar to the way punishment is handled in other labor contexts.¹⁸ The NFL has a few key documents, which provide the Commissioner the power to discipline players, and they are applicable in specific situations. These documents are the League's Constitution and Bylaws,¹⁹ the CBA,²⁰ the Personal Conduct Policy,²¹ and the Substance Abuse Policy.²² Because the Substance Abuse Policy is mutually agreed upon by both parties and is not in dispute (in terms of its legality or enforceability),²³ it will not be of focus in this Note. Notably, the other documents provide the Commissioner the authority to discipline players not only for their on-field—or work-site—behavior, but also provide the Commissioner the authority to discipline players for their off-field behavior.²⁴

¹⁶ Compare *id.* (stating that fifty-nine players were suspended for off-field conduct), with 2010 NFL Fines & Suspensions, SPOTRAC, <http://www.spotrac.com/nfl/fines-suspensions/2010/suspensions> [<https://perma.cc/9LDG-LRLW>] (last visited Feb. 26, 2016) (stating that twenty-seven players were suspended in 2010 for off-field conduct), and 2008 NFL Fines & Suspensions, SPOTRAC, <http://www.spotrac.com/nfl/fines-suspensions/2008/suspensions> [<https://perma.cc/B5S6-836P>] (last visited Feb. 26, 2016) (stating that eleven players were suspended in 2008).

¹⁷ See generally 2011 NFL CBA, *supra* note 10.

¹⁸ See *infra* Sections I.C–D.

¹⁹ Constitution and Bylaws of the National Football League (1970, revised 2006) [hereinafter NFL Constitution].

²⁰ 2011 NFL CBA, *supra* note 10.

²¹ National Football League Personal Conduct Policy (2014) [hereinafter 2014 PCP].

²² National Football League: Policy and Program of Substance Abuse (2014) [hereinafter 2014 SAP].

²³ See *id.*; see also Gregg Rosenthal, *NFLPA Approves New Drug Policy; HGH Testing Included*, NFL.com (Sept. 16, 2014) <http://www.nfl.com/news/story/0ap3000000393562/article/nflpa-approves-new-drug-policy-hgh-testing-included/> [<https://perma.cc/WU9M-63GG>]

²⁴ See, e.g., 2014 PCP, *supra* note 21 (authorizing the Commissioner to punish players for domestic violence, among other violent off-the-field crimes).

Recently, in 2014, former Baltimore Ravens Pro-Bowl running back Ray Rice was suspended by Commissioner Goodell, due to Rice's involvement in a domestic violence altercation with his then-fiancé.²⁵ In suspending Rice, Commissioner Goodell was acting pursuant to the authority granted to him under the NFL's 2013 Personal Conduct Policy.²⁶ After video of the altercation surfaced, the NFL changed his original two-game suspension into an indefinite suspension.²⁷ However, the increased suspension was overturned by an independent arbitrator, who stated that Commissioner Goodell "abuse[d] his discretion" in extending Rice's punishment based solely on a viewing of the incident.²⁸

Two more cases involving suspensions arising under the 2014 version of the NFL's Personal Conduct Policy, which is slightly different than the 2013 version,²⁹ involved All-Pro running back Adrian Peterson³⁰ and perennial Pro-Bowler Greg Hardy.³¹ Peterson's suspension came on the heels of a legal matter in which Peterson reached a plea-bargain for misdemeanor reckless assault for

²⁵ Ken Belson, *Rice Draws 2-Game Suspension from Goodell*, N.Y. TIMES (July 24, 2014), <http://www.nytimes.com/2014/07/25/sports/football/ray-rice-draws-2-game-suspension-from-nfl.html> [<https://perma.cc/EL4B-U79N>].

²⁶ *See id.*

²⁷ Ken Belson, *A Punch Is Seen, and a Player Is Out*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/09/sports/football/ray-rice-video-shows-punch-and-raises-new-questions-for-nfl.html> [<https://perma.cc/9UU3-EEJR>].

²⁸ Larry McShane & Gary Myers, *Ray Rice Wins Appeal to Overturn NFL Suspension, Roger Goodell Blasted for Mishandling Case*, N.Y. DAILY NEWS (Nov. 29, 2014), <http://www.nydailynews.com/sports/football/ray-rice-eligible-play-nfl-suspension-overturned-article-1.2027036> [<https://perma.cc/H9HN-YD7B>].

²⁹ In the 2014 version of the Personal Conduct Policy, there is a specified six game suspension for a first-time violation of any of the listed forms of conduct, and a lifetime suspension for a second violation of that same conduct. Additionally, the Commissioner, or a player's team, is permitted to place a player on the Commissioner's Exempt List—paid leave—while an investigation against that player is ongoing. *Compare* 2014 PCP, *supra* note 21, *with* National Football League Personal Conduct Policy (2013) [hereinafter 2013 PCP].

³⁰ Ryan Wilson, *What You Should Know About Adrian Peterson's Suspension, NFL Future*, CBS SPORTS (Dec. 13, 2014), <http://www.cbssports.com/nfl/eye-on-football/24884058/what-you-should-know-about-adrian-petersons-suspension-nfl-future> [<https://perma.cc/K7V3-NBC2>].

³¹ Dan Hanzus, *Greg Hardy Suspended 10 Games Without Pay*, NFL.COM (Apr. 22, 2015), <http://www.nfl.com/news/story/0ap3000000487503/article/greg-hardy-suspended-10-games-without-pay> [<https://perma.cc/5US8-9CQF>].

the lashing of his four-year old son.³² The Minnesota Vikings, Peterson's team, initially placed Peterson on the "Commissioner's Exempt List," a feature of the League's 2014 Personal Conduct Policy, which is a suspension with pay while his legal dispute was ongoing.³³ After Peterson reached a plea deal in the case, the NFL suspended him, without pay, for the remainder of the 2014 season.³⁴ In suspending Peterson, the Commissioner was acting pursuant to his authority under the NFL's 2014 Personal Conduct Policy.³⁵ Relevant to Peterson's suspension was the fact that pictures of the victim surfaced, depicting the horrific results of his actions, and these pictures certainly factored in the resulting suspensions.³⁶

Greg Hardy is alleged to have choked his girlfriend, thrown her on a futon covered in guns, and threatened her life.³⁷ Hardy was convicted of misdemeanor assault following a bench trial.³⁸ Under North Carolina state law, though, someone convicted of a misdemeanor following a bench trial has the right to appeal the conviction to a jury in the state's superior court.³⁹ On appeal for a jury trial, Hardy's case was dismissed after the victim did not show up

³² See Peter King, *Peterson's Punishment*, SPORTS ILLUSTRATED (Nov. 18, 2014), <http://mmqb.si.com/2014/11/18/adrian-peterson-suspension-appeal-roger-goodell> [https://perma.cc/K9YH-5V7J].

³³ *Adrian Peterson Timeline*, NFL.COM (Apr. 16, 2015, 9:08 PM), <http://www.nfl.com/news/story/0ap3000000485782/article/adrian-peterson-timeline/> [https://perma.cc/7GAD-NKH7].

³⁴ See *id.*

³⁵ See Wilson, *supra* note 30; see also *Adrian Peterson Suspended Without Pay for Remainder of 2014 NFL Season*, CBSNEWS (Nov. 18, 2014), <http://www.cbsnews.com/news/adrian-peterson-suspended-without-pay-for-remainder-of-2014-season> [https://perma.cc/2MHL-LEXE].

³⁶ See Ian O'Connor, *Visuals Sealed Adrian Peterson's Fate*, ESPN (Nov. 18, 2014), http://espn.go.com/nfl/story/_/id/11897549/minnesota-vikings-rb-adrian-peterson-was-done-horrific-visuals-child-abuse-case [https://perma.cc/4TFE-8HWV].

³⁷ See *Greg Hardy Case Dismissed After "Paid-Off" Accuser Disappears*, N.Y. POST (Feb. 9, 2015, 11:08 AM), <http://nypost.com/2015/02/09/greg-hardy-case-dismissed-after-paid-off-accuser-disappears/> [https://perma.cc/7DLU-AZH5].

³⁸ See Michael Gordon et al., *Panthers Greg Hardy Guilty of Assaulting Female, Communicating Threats*, CHARLOTTE OBSERVER (July 15, 2014), <http://www.charlotteobserver.com/news/local/crime/article9140591.html> [https://perma.cc/VG4Y-EL93]; see also *Panthers' Greg Hardy Guilty on 2 Counts of Domestic Violence*, USA TODAY (July 15, 2014), <http://www.usatoday.com/story/sports/nfl/2014/07/15/hardy-guilty-on-2-counts-of-domestic-violence/12714103/> [https://perma.cc/4ZAS-HKJ5].

³⁹ See N.C. GEN. STAT. § 15A-1431(b) (2015).

to testify.⁴⁰ The assault charge was based upon the testimony of the victim, and without the victim's cooperation, the case did not have enough evidence to continue.⁴¹ Allegedly, an undisclosed monetary settlement between Hardy and the victim caused the victim to stop cooperating with the prosecution.⁴² After the case was dismissed, Hardy was suspended for ten games by the NFL.⁴³ Hardy appealed his suspension to an independent arbitrator, in accordance with the NFL's CBA, and the suspension was reduced to four games.⁴⁴

Additionally, suspensions may be imposed on players for their on-field conduct.⁴⁵ In 2015, the NFL suspended Tom Brady, the two-time MVP of the New England Patriots, for his alleged involvement with the under-inflation of footballs, in contravention with the NFL's Game Manual.⁴⁶ Brady was initially suspended by Commissioner Goodell for four games, and the Commissioner then upheld the suspension through his authority under Article XLVI⁴⁷ in the NFL's CBA.⁴⁸ In what has become known as "Deflategate,"⁴⁹ the NFL and Brady have clashed for over a year starting in January 2015, following a playoff game, when a number of the Pa-

⁴⁰ *Panthers' Greg Hardy Guilty on 2 Counts of Domestic Violence*, *supra* note 38.

⁴¹ See Glenn Counts & Bora Kim, *Judge Dismisses Case Against Greg Hardy*, NBC CHARLOTTE (Feb. 10, 2015), <http://www.wncn.com/story/news/crime/2015/02/06/jury-selection-be-complicated-in-greg-hardy-trial/23008195/> [<https://perma.cc/63XY-4FM8>].

⁴² See *Panthers' Greg Hardy Guilty on 2 Counts of Domestic Violence*, *supra* note 38.

⁴³ Hanzus, *supra* note 31.

⁴⁴ Dan Hanzus, *Greg Hardy Suspension Reduced to Four Games*, NFL.COM (July 10, 2015), <http://www.nfl.com/news/story/0ap3000000500985/article/greg-hardy-suspension-reduced-to-four-games> [<https://perma.cc/T3UY-EUTT>].

⁴⁵ See 2011 NFL CBA, *supra* note 10, at app. A (stating that the Uniform Player Contract requires players to abide by an "Integrity of the Game" clause, which may subject players to punishment for violating that clause); see also *infra* note 131.

⁴⁶ *Timeline of Events for Deflategate, Tom Brady*, ESPN (Sept. 3, 2015), http://espn.go.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady [<https://perma.cc/F8A8-ZCMB>].

⁴⁷ Article 46 of the CBA, negotiated between the Players and the Owners, is the section that grants the Commissioner the power to discipline players for partaking in "conduct detrimental to the League." See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

⁴⁸ See *id.*; see also Ken Belson, *Judge Erases Tom Brady's Suspension; N.F.L. Says It Will Appeal*, N.Y. TIMES (Sept. 3, 2015), <http://www.nytimes.com/2015/09/04/sports/football/tom-brady-suspension-deflategate.html> [<https://perma.cc/EL9B-T3AB>]; Troy Vincent's Letter to Tom Brady, ESPN (May 12, 2015), http://espn.go.com/nfl/story/_/id/12873455/troy-vincent-letter-tom-brady [<https://perma.cc/9BHB-NBJN>].

⁴⁹ See *Timeline of Events for Deflategate, Tom Brady*, *supra* note 46.

triotics' footballs were removed at halftime for having air pressure below the requirement.⁵⁰ Upon Brady's appeal to federal district court, Judge Berman of the Southern District of New York overturned the suspension.⁵¹ Brady argued, and the Judge agreed, that Brady did not have notice of the potential four-game suspension for the accused conduct, nor did he have access to key witnesses and to the original report which was the basis for the suspension.⁵² Following the NFL's appeal, however, the Second Circuit overturned Judge Berman's decision, and reinstated Brady's four-game suspension.⁵³ The Second Circuit determined that Commissioner Goodell did not abuse his discretion, and acted within his power under the CBA.⁵⁴ The case has been remanded to the District Court, with instructions to uphold Goodell's decision to suspend Brady.⁵⁵ Brady can file a petition for an en banc review, where the entire panel of Second Circuit judges will rehear the case—as opposed to the initial three-judge panel—or Brady can file a petition for the case to be heard by the U.S. Supreme Court.⁵⁶ Though a review of either kind is pretty rare, Brady appears to be gearing up for another appeal.⁵⁷

All of the punishment issued to these players invites several important questions. How is discipline decided, and who is the one to decide it? How does the Commissioner's power and discretion

⁵⁰ See *id.*

⁵¹ Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, Nos. 15 Civ. 5916, 15 Civ. 5982 (RMB) (JCF), 2015 WL 5148739, at *20 (S.D.N.Y. Sept. 3, 2015).

⁵² See *id.* at *11, *16–20.

⁵³ See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, No. 15-2801, 2016 WL 1619883, at *17 (2d Cir. 2016).

⁵⁴ See *id.* at *12–17.

⁵⁵ See *id.* at *17.

⁵⁶ See Michael McCann, *Tom Brady Faces Long Odds After NFL Wins Deflategate Appeal*, SPORTS ILLUSTRATED (Apr. 25, 2016), <http://www.si.com/nfl/2016/04/25/tom-brady-deflategate-suspension-nfl-appeal-roger-goodell> [https://perma.cc/W33F-RKMQ].

⁵⁷ See *id.* (stating that less than one percent of Second Circuit *en banc* petitions are granted, and roughly one percent of Supreme Court petitions are granted); see also Dan Graf, *Tom Brady Appears to Be Getting Ready for Another Deflategate Appeal*, FOX SPORTS (Apr. 29, 2016), <http://www.foxsports.com/nfl/story/tom-brady-new-england-patriots-deflategate-suspension-appeal-042916> [https://perma.cc/8UZ8-24TJ].

in imposing discipline on players compare to other sports or industries? How does the due process afforded to the players compare to other sports or industries? What kind of rights do the players have in challenging their punishment?

Part I of this Note first discusses due process rights provided to the general population, and then discusses how due process rights apply in the workplace, specifically in employee discipline. Part I then analyzes the NFL Commissioner's power to discipline players, and the players' due process rights throughout the NFL's disciplinary process. Additionally, Part I looks at the players' rights to appeal disciplinary decisions, and the NFL Commissioner's power to review disciplinary decisions under the CBA and Personal Conduct Policy. Part I finishes by comparing the NFL players' due process and appeal rights to players in the MLB and the NBA, as well as to union employees working for Ford Motor Company, and for the New York City Police Department. Part II addresses the main conflict presented in this Note, which concerns the adequacy of the due process rights provided to NFL players in their discipline as compared to the rights of employees in other labor contexts. Part III proposes a new structure for the NFL's disciplinary process, drawing from various concepts and theories utilized by the NBA, MLB, Ford, and the NYPD. This Note concludes with an analysis of the pros and cons of the proposed solution.

I. BACKGROUND

A. *Due Process*

1. Generally

Due process is a fundamental protection, not only to the workplace, but to the country—and its people—as a whole. It is such a fundamental concept, it is enumerated in two separate amendments in the Constitution: the Fifth, which prohibits the federal government from infringing on due process,⁵⁸ and the Fourteenth, which prohibits the state government from infringing on due process.⁵⁹ Though due process is a very complicated concept,

⁵⁸ See U.S. CONST. amend. V.

⁵⁹ *Id.* at amend. XIV, § 1.

what it entails is an individual's right to fairness, both substantively and procedurally.

The concept of due process is a two-step examination, consisting of both a substantive due process determination, and a procedural due process determination.⁶⁰ Under the Fourteenth Amendment, states are prohibited from depriving "any person of life, liberty, or property, without due process of law."⁶¹ Courts have interpreted this provision to grant substantive due process rights, protecting the people in three aspects. First, substantive due process protects rights explicitly enumerated in the Constitution's Bill of Rights;⁶² second, substantive due process protects the rights that may not be explicitly listed, but have been deemed fundamental nonetheless;⁶³ and third, substantive due process protects citizens against arbitrary abuses of government power, even where there is no enumerated or fundamental right being implicated.⁶⁴

Procedural due process guarantees that when someone's substantive due process rights are being infringed, he or she must be

⁶⁰ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (stating that the court must determine whether there is a protected liberty or property interest and, if so, what procedures are required).

⁶¹ U.S. CONST. amend. XIV, § 1.

⁶² See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that a broad D.C.-wide ban on handguns violated the Second Amendment infringing on substantive due process).

⁶³ The right to privacy has been viewed as a fundamental right, though ruling certain interests to be fundamental has come with significant backlash:

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary the boundary of the nuclear family.

Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977).

⁶⁴ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) (ruling that the government action must not be unreasonable, arbitrary, or capricious and that the means selected have a real and substantial relation to the object sought to be attained).

provided sufficient procedures as a remedy.⁶⁵ Determining the sufficiency of particular procedures requires taking a look at three separate factors. First, the private interest being affected; second, the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.⁶⁶ After looking at those three factors, a determination is typically made on whether or not the procedures provided are sufficient to the harmed party.⁶⁷

Due process, in general, is an incredibly complex topic. In the context of this Note, what is most important in the analysis of NFL player discipline is the ways in which due process affects the workplace and the due process rights that are typically provided to employees.

2. Due Process Within Labor

Applying the principles of due process to the workplace can be tricky when considering that the due process rights provided in the Constitution are geared to protect people from government interference, not interference from a private party, such as an employer.⁶⁸ Regardless, due process rights are always provided to public employees, and are provided to private employees when there is a contractual agreement providing such rights. The rights provided are typically consistent with those protected by the Fifth and Fourteenth Amendments.⁶⁹ Additionally, courts have extended certain common-law due process rights typically reserved for public em-

⁶⁵ See *Mathews*, 424 U.S. at 332–33.

⁶⁶ *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005).

⁶⁷ See *id.*

⁶⁸ See U.S. CONST. amend. XIV, § 1; *id.* at amend. V.

⁶⁹ See JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE & LOCAL EMPLOYMENT LIABILITY §§ 14:20, 14:23 (Dec. 2015). Although private employers are not required to provide employees with the same due process rights that public employers are required to provide, they typically do provide them in collective bargaining agreements after the Union bargained for them, or as a policy decision to foster Employee-Employer peace. See Pietro Lynn, *Pretermination Hearing Is Not Always Necessary*, 2 VT. EMP. L. LETTER, no. 10, 1997, at 1.

ployment⁷⁰ to private contractual relationships,⁷¹ namely, notice of the pending discipline and a fair hearing before an impartial tribunal.⁷² Courts will extend due process rights into the contractual relationship in an employment setting in two main instances: when an employee's economic interests are impacted, or when there is a wrongful termination claim at stake.⁷³ Courts are reluctant to extend due process rights into the employment relationships though, as they typically do not want to interfere with the contracts that private parties enter into.⁷⁴

In the private labor context, businesses employ either a non-unionized or a unionized workforce.⁷⁵ In a non-unionized workforce, employment is usually based on individual contracts signed by employees and is typically "at-will" employment.⁷⁶ "At-will" employment simply means that the employee may be fired at any time or the employee may quit at any time.⁷⁷ Since the NFL is a unionized workforce though,⁷⁸ this Section focuses on the procedural due process rights provided to unionized employees.

When represented by a union, the employees and employer typically will negotiate a CBA, which dictates various terms of employment.⁷⁹ One of the terms that is typically addressed in a CBA is

⁷⁰ Public employment is best categorized as being employed by the government, as opposed to a private organization. *Public Employee Law and Legal Definition*, U.S. LEGAL, <http://definitions.uslegal.com/p/public-employee/> [https://perma.cc/WF5P-3YVD] (last visited Feb. 14, 2016).

⁷¹ See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 590 (2000).

⁷² See *id.*

⁷³ See *id.* at 589; *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F. Supp. 438, 445–47 (N.D. Cal. 1995) (termination of membership based solely on physician's previous drug addiction was arbitrary and capricious, and violated plaintiff's common law right to fair procedures).

⁷⁴ See *infra* notes 124–29.

⁷⁵ See *The Union Difference*, AFL-CIO, <http://www.aflcio.org/Learn-About-Unions/What-Unions-Do/The-Union-Difference> [https://perma.cc/WBN3-6EP3] (last visited Feb. 14, 2016).

⁷⁶ See J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 838 (1995); see also Gary S. Fealk, *At-Will Employment vs. Just Cause Employment*, 25 MICH. EMP. L. LETTER, no. 2, 2014, at 3.

⁷⁷ See Verkerke, *supra* note 76, at 838.

⁷⁸ See generally 2011 NFL CBA, *supra* note 10.

⁷⁹ See Verkerke, *supra* note 76, at 864–65.

how employees are to be disciplined.⁸⁰ Discipline may be further elaborated in supportive materials, like an employee handbook, which may further specify certain behavior that will be disciplined, and the severity of discipline that may be issued based on the employee's conduct.⁸¹

Typically, discipline is handled in unionized workforces under a "just cause" standard, which means that an employee will only be disciplined for conduct that constitutes "cause."⁸² How "cause" is determined is usually a subjective determination made by the disciplinary officer, but may be further specified by materials such as an employee handbook, as discussed above.⁸³ Having a "just cause" standard is a crucial right provided to employees, because it safeguards them from being disciplined arbitrarily.⁸⁴ When being disciplined for "cause," employees must also be afforded procedural due process rights leading up to the disciplinary decision.⁸⁵

When determining the due process rights provided to employees, there are typically two different aspects that a CBA sets out: adequate notice of conduct that is subject to discipline, and a fair hearing for the employee to oppose the pending discipline.⁸⁶ Adequate notice is a fundamental due process right in employee discipline, because employees need to know what conduct is going to be punished, and how it will be punished.⁸⁷ Additionally, the employees need to know whether or not certain conduct has been punished in the past, and if they are currently facing any sort of discipline for their conduct.⁸⁸

A fair hearing is also an important procedural due process right provided to employees because being able to explain the situation before the disciplining body can be the difference between being

⁸⁰ *See id.*

⁸¹ *See id.* at 889–90.

⁸² *See Fealk, supra* note 76.

⁸³ *See generally Verkerke, supra* note 76, at 889–90.

⁸⁴ *Id.* at 838.

⁸⁵ *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

⁸⁶ *See id.* at 542–45.

⁸⁷ *See id.* at 546.

⁸⁸ *See generally id.*

disciplined or not.⁸⁹ Additionally, by being able to present evidence, or to at least elaborate on exactly what happened, the employee may be able to mitigate the discipline, and have it reduced, if not completely erased.⁹⁰

These are two of the more common procedural due process rights afforded to employees and are two of the more basic rights that employees are typically provided. Since there are other due process rights provided to employees,⁹¹ it is important to look at how player and employee discipline has been handled in the past, and the rights that are currently provided to players in the NFL, MLB, and NBA, as well as employees in companies like Ford and organizations like the NYPD.

B. History of Power Granted to Sports Commissioners

The history of the power granted to sports commissioners is a long one, and one that is not tailored specifically to disciplining players. Though player discipline is something that all sports commissioners are empowered to handle, the power to do so first began in the MLB, and fell under the broad power of the Commissioner to take action in the “best interests” of the League.⁹² The “best interests” power was created and implemented in 1921 by the first Commissioner of MLB, Kenesaw Mountain Landis.⁹³ After the 1919 “Black Sox” scandal, in which members of the White Sox baseball team had been found to have intentionally thrown a World Series championship,⁹⁴ Landis was appointed as the Commissioner of MLB. However, Landis was reluctant to take the job, and only accepted on the condition that he was provided broad dis-

⁸⁹ See *id.* at 542–43.

⁹⁰ See *id.* at 543–44.

⁹¹ See *infra* Sections I.D.1–4.

⁹² See Matthew L. Winkel, *The Not-So-Artful Dodger: The McCourt-Selig Battle and the Powers of the Commissioner of Baseball*, 31 CARDOZO ARTS & ENT. L.J. 539, 540–44 (2013).

⁹³ See *id.* at 542–44; see also Jonathan M. Reinsdorf, *The Powers of the Commissioner in Baseball*, 7 MARQ. SPORTS L.J. 211, 220–22 (1996); *Kenesaw Mountain Landis Bio Page*, BASEBALL HALL OF FAME, <http://baseballhall.org/hof/landis-kenesaw> [<https://perma.cc/554R-G7HL>] (last visited Feb. 26, 2016).

⁹⁴ See Reinsdorf, *supra* note 93, at 219–20.

ciplinary power to protect the “best interests of the game.”⁹⁵ Since that initial language was implemented, commissioners in other sports have utilized the clause during their tenure.⁹⁶ As former MLB Commissioner Bud Selig stated, “[T]he intent of the best interest clause was to protect the integrity of and ensure public confidence in the game.”⁹⁷

In *Milwaukee American Association v. Landis*, the court had to decide if a Major League team owner, who also owned Minor League teams, could transfer a player back and forth between his Major League team and Minor League teams using outright sales agreements.⁹⁸ By doing so, and failing to disclose these agreements to other Major League teams, the owner was able to get around the waiver process, whereby a different owner could “claim” the player for his team.⁹⁹ When the owner sought the Commissioner’s approval for a contract with the player, the Commissioner refused to grant it.¹⁰⁰ The team challenged the Commissioner’s power to deny approval for the contract, and the court sided with the Commissioner.¹⁰¹ The court reasoned, “[T]he commissioner is empowered to investigate upon his own initiative any act . . . charged or alleged to be detrimental to the best interests of baseball, to determine what . . . action is appropriate . . . and to take such action against leagues or clubs as the case may require.”¹⁰² In its reasoning, the court ultimately held that the Commissioner was acting within his discretionary power in disapproving the player’s contract.¹⁰³

In 1965, spearheaded by Marvin Miller, a pivotal figure in players’ union history, the first real agreement in the MLB was formed

⁹⁵ Bukowski, *supra* note 4, at 109–10 (2001); *see also* Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 26 (2008).

⁹⁶ *See, e.g.*, 2011 NFL CBA, *supra* note 10, at art. 46 (prohibiting conduct “detrimental” to the game, thus protecting its best interests).

⁹⁷ Matthew A. Foote, *Three Strikes and You’re (Not Necessarily) Out: How Baseball’s Erratic Approach to Conduct Violations Is Not in the Best Interest of the Game*, 6 DEPAUL SPORT L. CONTEMP. PROBS. 1, 6 (2009).

⁹⁸ *See Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298, 300–01 (N.D. Ill. 1931).

⁹⁹ *See id.* at 302.

¹⁰⁰ *See id.* at 299–301.

¹⁰¹ *See id.* at 304.

¹⁰² *Id.* at 302.

¹⁰³ *See id.* at 304.

between the players' union and the team owners.¹⁰⁴ Although it initially only covered pensions and insurance, two years later Miller negotiated a full labor agreement, including a formal grievance procedure.¹⁰⁵ Building off of the first agreement, Miller was able to argue that the Commissioner was not an "impartial arbitrator" to decide grievances, and successfully negotiated to have players' grievances that did not involve violations of the "integrity of the game" clause to be heard by third party arbitrators in the next CBA.¹⁰⁶ Though this was the first instance of arbitration heard by an impartial third party, the Commissioner's "best interests" power was still in full effect.¹⁰⁷

Finley v. Kuhn followed a similar factual narrative as *Landis*, where then-Commissioner Bowie Kuhn rejected an attempt by one Major League team to sell three of its players to other Major League teams.¹⁰⁸ Kuhn determined that the attempted maneuver went against the "best interests" of baseball, and cited his "best interests" power in refusing to permit the transaction.¹⁰⁹ Again, the court ruled that "[t]he Commissioner has been given broad power . . . to investigate any act . . . not in the best interests of baseball, to determine what . . . action is appropriate . . . and to take that action. [This includes] the . . . power to . . . disapprove the assignments of players."¹¹⁰ Ultimately, the court again concluded that the Commissioner's broad use of power was permissible given the facts of the case.¹¹¹

¹⁰⁴ See Michael Macklon, *The Rise of Labor Unions in Pro Sports*, INVESTOPEDIA (Apr. 25, 2013), <http://www.investopedia.com/financial-edge/0711/the-rise-of-labor-unions-in-pro-sports.aspx> [https://perma.cc/86QR-AKG2]; see also Tim Marchman, *Marvin Miller: How the Greatest Union Man in Sports History Shaped the Games We Watch Today*, SLATE (Nov. 27, 2012), http://www.slate.com/articles/sports/obit/2012/11/marvin_miller_dead_how_the_greatest_union_man_in_sports_history_shaped_the.html [https://perma.cc/S5DM-D2N2].

¹⁰⁵ See Michael J. Cozzillio, *From the Land of Bondage: The Greening of Major League Baseball Players and The Major League Baseball Players Association*, 41 CATH. U. L. REV. 117, 137 (1991).

¹⁰⁶ See *id.*

¹⁰⁷ See generally Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978).

¹⁰⁸ See *id.* at 531; Benjamin I. Leibovitz, *Unnecessary Roughness? A Review of the NFL Commissioner's on-the-Field Disciplinary Powers*, 20 SPORTS L.J. 187, 195 (2013).

¹⁰⁹ See *Kuhn*, 569 F.2d at 531.

¹¹⁰ *Id.* at 534.

¹¹¹ See *id.* at 539–40.

The NFL has since adopted a similar provision in its CBA, where the commissioner may punish players for participating in conduct that is detrimental to the League.¹¹² This power has generally been upheld when challenged in court.¹¹³ This power has usually been upheld because, for a court to hear a case challenging the commissioner's power, it has to interpret the CBA itself in order to determine if the commissioner is acting properly, something courts are not typically eager to do.¹¹⁴ For example, in 2011, New Orleans Saints players and coaches were accused of involvement in a scheme where players were paid under the table for targeting key opposing players and injuring them; this became known as "Bountygate."¹¹⁵ Commissioner Goodell suspended four players for their participation in the scheme, with the suspensions ranging from three games to a full season. Moreover, the head coach was suspended for a full season, the general manager was suspended for eight games, the assistant head coach was suspended for six games, and the defensive coordinator was suspended indefinitely.¹¹⁶ Additionally, Commissioner Goodell fined the organization \$500,000 and also made the organization forfeit two second-round draft picks.¹¹⁷ After the punishments for "Bountygate" were imposed, one of the suspended players, Jonathan Vilma, challenged the Commissioner's power to suspend him by alleging claims of defamation and intentional infliction of emotional distress.¹¹⁸ The Commissioner moved to dismiss the two claims, which the court

¹¹² See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

¹¹³ See generally *infra* Section I.C.

¹¹⁴ See *infra* notes 122–28.

¹¹⁵ See Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 92, 105 (2014).

¹¹⁶ The defensive coordinator, Gregg Williams, ended up being suspended for the remainder of the 2012 season, and was reinstated prior to the start of the 2013 season. See generally Ryan Wilson, *Gregg Williams on Bountygate: It Was "Nothing That Hadn't Been Done Before"*, CBS SPORTS (July 26, 2015), <http://www.cbssports.com/nfl/eye-on-football/25250232/gregg-williams-on-bountygate-it-was-nothing-that-hadnt-been-done-before> [<https://perma.cc/2W4A-HEFQ>].

¹¹⁷ See *Jonathan Vilma Banned for Year*, ESPN (May 3, 2012), http://espn.go.com/nfl/story/_/id/7881761/nfl-bans-four-players-new-orleans-saints-bounty-roles [<https://perma.cc/52LV-ELW5>].

¹¹⁸ See *Vilma v. Goodell*, 917 F. Supp. 2d 591, 593 (E.D. La. 2013).

ultimately granted, because the Labor Management Relation Act¹¹⁹ (“LMRA”) prevented the court from interpreting the CBA between the parties.¹²⁰ In *Vilma*, the court had to interpret the CBA to determine if the Commissioner was acting in accordance with the “conduct detrimental” to the League provision.¹²¹ The court concluded that such an action was not permitted under the LMRA.¹²²

In hearing a case where an arbitrator has already ruled on the issue—which is the case in the NFL because an arbitrator oversees the appeal of player discipline—courts will rarely overturn the decision of an arbitrator, especially when it comes to interpretation of a CBA.¹²³ The arbitration procedural step is mutually agreed upon, and labor law’s “private association” principle prevents many courts from interpreting the private agreements between parties.¹²⁴ The primary rationale behind this principle is that agreements between private parties should mean something, and should not be overturned or subject to interference.¹²⁵ Though courts will typically decline to hear a challenge to a Commissioner’s decision in the

¹¹⁹ Under the LMRA, the power to interpret a CBA in dispute generally belongs to the agreed upon person as set forth in the disputed CBA. Under the NFL’s CBA, the body entitled to interpret the application of the CBA is an agreed upon arbitrator. *See id.* at 593, 595–96.

¹²⁰ *See id.* at 595.

¹²¹ *See id.* at 596.

¹²² *See id.* at 595–96.

¹²³ *See* Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504, 504 (2001) (ruling that the Court of Appeals’ decision to overturn the arbitrator and decide the case on the merits was at odds with governing law); *E. Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 67 (2000) (holding that there should be deference to a collectively bargained arbitrator’s decision in construing or applying a contract); *see also* *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–97 (1960) (stating that the court will only set aside an arbitrator’s ruling in rare instances).

¹²⁴ “A most dramatic illustration of this principal occurred in *Carr v. St. John’s University*, . . . 231 N.Y.S.2d 410 (1962), where the court refused to interfere with a university’s decision to expel Catholic students who had participated in a civil marriage ceremony.” Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, n.38 (1995); *see generally* Jeffrey A. Durney, *Fair or Foul? The Commissioner and Major League Baseball’s Disciplinary Process*, 41 EMORY L.J. 581, 630 (1992); Christopher J. McKinny, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 236 (2003).

¹²⁵ *See* Stiglitz, *supra* note 124, at n.38.

best interests of the sport,¹²⁶ they will often hear three types of decisions. The first is determining whether the Commissioner acted in good faith.¹²⁷ The second is whether the punishment was issued within the Commissioner's authority.¹²⁸ The final is if there is a challenge to the procedural correctness in the manner that discipline was handled.¹²⁹

Ultimately, it seems that so long as the parties have agreed to the terms of their CBA, the "best interests" and "conduct detrimental" clauses grant the commissioner the power to impose discipline and is legally permissible, and will continue to exist in future professional sports' CBAs.

C. Current Punishment in the NFL

Athletes in the NFL are subject to punishment from multiple sources. First, the Commissioner has direct authority to discipline players under the power of the NFL's Constitution and Bylaws ("NFL Constitution").¹³⁰ This power is supported by the NFL's CBA,¹³¹ and the terms of the Uniform Players' Contract ("UPC"), which is found in Appendix A of the 2011 CBA.¹³² Moreover, re-

¹²⁶ See *infra* Sections I.C–D.2.

¹²⁷ *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 539 (7th Cir. 1978) (deciding that the MLB commissioner had acted in good faith, and looking no further into the appropriateness of the given punishment).

¹²⁸ *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1223 (N.D. Ga. 1977) (deciding that denying a team a draft choice was outside the scope of the MLB commissioner's disciplinary authority).

¹²⁹ Stiglitz, *supra* note 124, at 176.

¹³⁰ See NFL Constitution, *supra* note 19, at art. VIII §§ 8.6, 8.13, 8.14.

¹³¹ See 2011 NFL CBA, *supra* note 10, at art. 46; Logan O'Shaughnessy, *After Review: An Open Letter to NFL Commissioner Roger Goodell Suggesting that Limiting the League's Disciplinary Power Under the Personal Conduct Policy May Be in the League's Best Interests*, 88 U. DET. MERCY L. REV. 527, 530–31 (2011); Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 187–88 (2010).

¹³² See 2011 NFL CBA, *supra* note 10, at app. A. Under the UPC, players can be punished by the Commissioner in accordance with the "Integrity of the Game" provision. See 2011 NFL CBA, *supra* note 10, at app. A § 15. It states:

Player . . . acknowledges . . . that if he . . . is guilty of any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League . . . the Commissioner will have the right, but only after giving Player the opportunity for a hearing . . .

cent developments in the League have given rise to an additional source of player punishment: the 2014 Personal Conduct Policy,¹³³ which was unilaterally implemented by the NFL.¹³⁴ The Commissioner has full power to levy fines and/or suspensions, for player conduct “detrimental to the integrity of, or public confidence in, the game of professional football.”¹³⁵ As a result of these various documents, the League, and therefore the commissioner, has broad authority to assign punishment¹³⁶ for not only player conduct during games, but also off-the-field player behavior as well.¹³⁷

Adding to the complexity of the NFL's discipline structure, players may utilize grievance processes¹³⁸ in challenging a punishment imposed on them. However, the CBA permits the commissioner to appoint himself as the hearing officer for most forms of player discipline.¹³⁹ Ultimately, the commissioner's power in overseeing these grievances is, like his power to subjectively render the initial punishment decision, very strong.¹⁴⁰

to . . . fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.

2011 NFL CBA, *supra* note 10, at app. A § 15.

¹³³ The Personal Conduct Policy is a supplemental document to the NFL's CBA, which provides examples of conduct which will be punished. It also provides specific punishments for certain forms of conduct, and provides the Commissioner the power to suspend a player, with pay, while an investigation against that player is ongoing. *See generally* 2014 PCP, *supra* note 21.

¹³⁴ *See* Mike Florio, *NFLPA Criticizes “Unilateral” Imposition of Personal Conduct Policy*, NBCSPORTS: PROFOOTBALL TALK (Dec. 10, 2014, 2:48 PM), <http://profootballtalk.nbcsports.com/2014/12/10/nflpa-criticizes-unilateral-imposition-of-personal-conduct-policy/> [<https://perma.cc/K8QS-ZE73>].

¹³⁵ 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

¹³⁶ *See, e.g.*, NFL Constitution, *supra* note 19, at art. VIII § 8.13(A).

¹³⁷ *See* 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

¹³⁸ A grievance process is the process, enumerated in the CBA, by which someone who is being disciplined under the CBA, may appeal that disciplinary decision. *See generally* 2011 NFL CBA, *supra* note 10.

¹³⁹ *See* 2011 NFL CBA, *supra* note 10, at art. 46 § 2(a); *see also* 2014 PCP, *supra* note 21, at 7 (“Appeals of any disciplinary decision will be processed pursuant to Article 46 of the Collective Bargaining Agreement.”).

¹⁴⁰ *See* 2011 NFL CBA, *supra* note 10, at art. 46 § 2(a) (stating that the Commissioner may appoint himself as the hearing officer in any appeal stemming from on-field conduct or off-field conduct deemed to be detrimental to the League).

1. Collective Bargaining Agreement & Constitution and Bylaws

To fully understand the Commissioner's power at the initial discipline stage, it is important to start with the current CBA between the Management and the NFL Players Association ("NFLPA"), in conjunction with the NFL Constitution. The NFL Constitution and the CBA are two separate documents. While the NFL Constitution lays out the basic framework for how the League functions and may be amended from time to time,¹⁴¹ the CBA is tailored more specifically to various aspects of the League and is changed as each CBA period expires to provide for negotiations over disputed issues.¹⁴² Although the NFL Constitution grants the Commissioner the initial power underlying his authority to discipline players for their conduct,¹⁴³ the CBA elaborates further as to what conduct the Commissioner is entitled to discipline, and limits the Commissioner's power through its negotiation process.¹⁴⁴

More applicable to recent punishments,¹⁴⁵ the current NFL CBA ("2011 CBA"), which is the "product of bona fide arm's length collective bargaining"¹⁴⁶ between the owners and the NFLPA, was officially entered into on August 4, 2011.¹⁴⁷ The 2011 CBA was the end result of the lengthy and contentious bargaining that went on between the two sides from 2008 to 2011.¹⁴⁸

¹⁴¹ See Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45, 47 (2010).

¹⁴² See *id.* at 48.

¹⁴³ See NFL Constitution, *supra* note 19, at art. VIII.

¹⁴⁴ See Wilson, *supra* note 141, at 48.

¹⁴⁵ See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, Nos. 15 Civ. 5916, 15 Civ. 5982 (RMB) (JCF), 2015 WL 5148739, at *20 (S.D.N.Y. Sept. 3, 2015) (rejecting a defense under Article 46 of the NFL's current CBA).

¹⁴⁶ 2011 NFL CBA, *supra* note 10, at Preamble.

¹⁴⁷ See *id.*

¹⁴⁸ After the 2006–2013 CBA had been seen as a "win for the players" due to their revenue share, the owners opted out of the CBA in 2008. The two sides negotiated for some time, but could not come to an agreement before the end of the 2010–2011 season. As a result, the players were locked out, and brought antitrust actions against the League. After numerous legal issues were resolved, the two sides ultimately came to an agreement, and formed the 2011 CBA. The major sticking point was how the revenue would be divided, and though the players ultimately got the share they were seeking, one of the concessions they made was the power that the Commissioner would retain over player discipline. See Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis*

Under Article XI of the 2006 CBA, the Commissioner was permitted to fine or suspend a player for “conduct detrimental to the integrity of, or public confidence in, the game of professional football.”¹⁴⁹ The language implemented in that provision is extremely broad, as it could be anything perceived as negative, and is subjectively determined by the Commissioner.¹⁵⁰ Now known as the Commissioner’s “Article XLVI Power,” Article XLVI of the 2011 CBA adopted the same language used in Article XI of the 2006 CBA in disciplining players “for conduct detrimental to the integrity of, or public confidence in, the game of professional football.”¹⁵¹ As such, the only added limitation that was placed on the Commissioner’s power in the 2011 CBA was the amount of money that the Commissioner could fine players.¹⁵²

Under the Commissioner’s Article XLVI power, the only due process rights provided to the player who is disciplined is notice of the punishment,¹⁵³ and that a player may only be punished *one time* for a particular incident, by either the player’s team or by the League.¹⁵⁴ This “One Penalty” due process right was the focal point of the Ray Rice case, where Rice’s suspension was overturned after the Commissioner extended it based on later seeing video of the action.¹⁵⁵ There is no requirement for an opportunity for the player to be heard, though the NFL may conduct their own

of the 2011 Collective Bargaining Process and Agreement in the National Football League, 19 UCLA ENT. L. REV. 1, 14–27 (2012); see generally Jeffrey F. Levine & Bram A. Maravent, *Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1419 (2010).

¹⁴⁹ NFL Collective Bargaining Agreement art. XI § 1(a) (2006) [hereinafter 2006 NFL CBA].

¹⁵⁰ See *id.*

¹⁵¹ Compare 2006 NFL CBA, *supra* note 149, at art. XI § 1(a), with 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

¹⁵² Under the 2011 CBA, fines can be challenged as being excessive if they exceed twenty-five percent of a player’s weekly earnings for the first offense, or fifty percent of a player’s weekly earnings for a second offense. See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(d).

¹⁵³ See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

¹⁵⁴ See *id.* at art. 46 § 4.

¹⁵⁵ Darren Heitner, *Ray Rice Discipline Brings to Light Poorly Drafted NFL Collective Bargaining Agreement*, FORBES: SPORTSMONEY (Sept. 11, 2014, 7:52 AM), <http://www.forbes.com/sites/darrenheitner/2014/09/11/ray-rice-discipline-brings-to-light-poorly-drafted-nfl-collective-bargaining-agreement/> [https://perma.cc/BAS5-LU3U].

internal investigation into the alleged action that is the subject of discipline.¹⁵⁶ Regardless, because the NFL is a private labor organization, there is no required due process right that they failed to provide.¹⁵⁷ Any obligations to provide certain due process rights, at least in theory, begin and end with the CBA.¹⁵⁸

The players' grievance process is found under Article XLVI, similar to the provision that subjects them to the initial discipline.¹⁵⁹ For any punishment involving section 1(b) of Article XLVI, which covers unsportsmanlike conduct or unnecessary roughness penalties on the field of play,¹⁶⁰ the NFL and the NFLPA will jointly select two hearing officers for any players challenging punishment under that section.¹⁶¹ For an appeal of any punishment under section 1(a), which essentially covers all conduct outside the two specified instances under section 1(b),¹⁶² the commissioner shall appoint one or more individuals to hear the appeal, after consulting with the NFLPA.¹⁶³ Although this may seem like a fair agreement to hearing an appeal, it comes with a caveat: "[n]otwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion."¹⁶⁴

In adding that provision, the Commissioner is essentially granted the power to not only issue an initial punishment, but to be the one to uphold the punishment on appeal.¹⁶⁵ Because this appeal process governs punishments issued pursuant to both the CBA and the Personal Conduct Policy,¹⁶⁶ the Commissioner is granted tremendous power in player punishment.¹⁶⁷

¹⁵⁶ See generally 2011 NFL CBA, *supra* note 10.

¹⁵⁷ See Charles Bennett, *Ray Rice and All Other NFL Players Gave Up Their Due Process Rights*, SPORTS AGENT BLOG (Sept. 9, 2014), <http://sportsagentblog.com/2014/09/09/ray-rice-and-all-other-nfl-players-gave-up-their-due-process-rights/> [https://perma.cc/3TXF-FVQ5].

¹⁵⁸ See *id.*

¹⁵⁹ See 2011 NFL CBA, *supra* note 10, at art. 46 § 2.

¹⁶⁰ *Id.* at art. 46 § 1(b).

¹⁶¹ See *id.* at art. 46 § 2(a).

¹⁶² Compare *id.* at art. 46 § 2(a), with *id.* at art. 46 § 2(b).

¹⁶³ See *id.* at art. 46 § 2(a).

¹⁶⁴ *Id.*

¹⁶⁵ See *id.*

¹⁶⁶ See 2011 NFL CBA, *supra* note 10, at art. 46 § 2(a) (stating that the Commissioner may appoint himself as the hearing officer in any appeal stemming from on-field conduct

Due to the breadth of the Commissioner's power, it came as no surprise that the NFLPA was criticized for continuing to allow such power to be delegated to the Commissioner.¹⁶⁸ The Commissioner's current power continues to enable a situation where the Commissioner's discretion is very influential in the determination of a player's discipline. As noted though, the Commissioner's discretionary power has been upheld in federal courts in the past.¹⁶⁹ Moreover, both commissioners for other sports and employers imposing discipline over unionized employees in other industries are accorded similar discretion as well.¹⁷⁰

Though courts will typically decline to rule on whether the Commissioner's actions are in the best interest of the sport, they have heard cases in which the Commissioner's impartiality was questioned.¹⁷¹ Though players are almost always precluded from bringing suits against the League, Article III of the 2011 CBA permits legal action where a player is claiming the Commissioner has breached Articles XVI and XLIII for the player's right to an "impartial arbitrator."¹⁷² Normally, players are precluded from bring-

or off-field conduct deemed to be detrimental to the League); *see also* 2014 PCP, *supra* note 21, at 7 (stating that "[a]ppeals of any disciplinary decision will be processed pursuant to Article 46 of the Collective Bargaining Agreement").

¹⁶⁷ *See, e.g.*, 2014 PCP, *supra* note 21, at 7.

¹⁶⁸ *See* Kevin Van Valkenburg, *Power Mad*, ESPN (Dec. 28, 2012), http://espn.go.com/nfl/story/_/id/8769645/has-nfl-commissioner-roger-goodell-power-gone-too-far-espn-magazine [<https://perma.cc/4JML-7Y2W>] ("The commissioner's power exists, after all, only because it's granted to him by the NFLPA.").

¹⁶⁹ *See, e.g.*, *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298, 304 (N.D. Ill. 1931) (upholding baseball Commissioner's discretionary power to act in the "best interests" of the game); *see also* *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 538 (7th Cir. 1978) (upholding Commissioner Bowie Kuhn's right to determine the best interests of baseball).

¹⁷⁰ *See infra* Sections I.D.1-4.

¹⁷¹ *See infra* note 179.

¹⁷² *See* 2011 NFL CBA, *supra* note 10, at art. III.

The NFLPA agrees that neither it nor . . . its members . . . will sue . . . the NFL . . . provided, however, that nothing contained in this Section 2 will prevent the NFLPA or any player from asserting that . . . the NFL, has: (1) breached the terms of this Agreement . . . and from processing such asserted breach as a non-injury grievance under Article 43 or asserting any claim before the System Arbitrator or the Impartial Arbitrator as provided in this Agreement; or (2) breached the terms of the *Brady* Settlement Agreement and from asserting such a claim before the System

ing claims against the League in court, but where they challenge the hearing officer's impartiality, they may seek further action in court.¹⁷³

Recently, when Tom Brady brought suit against the League, he did so under Article III's carve-out provision.¹⁷⁴ In having his suspension overturned, Brady provided a huge win for the players' due process rights. As stated before, the Commissioner's suspension was overturned because: (1) the NFL provided insufficient notice to Brady of such a penalty for a potential violation; (2) the NFL failed to provide Brady with access to key witnesses against him; and (3) the Commissioner wrongly denied Brady access to the files that were the basis of his suspension, at his appeal hearing.¹⁷⁵ Though notice of the penalty/discipline is an explicit due process right in the 2011 CBA, the other two grounds for the suspension reversal are not so clearly enumerated.¹⁷⁶ In overturning Brady's suspension, Judge Berman emphasized that Brady was denied access to an impartial arbitrator in his appeal, in accordance with Article III, and further that Brady was not provided the due process rights that fairness would dictate.¹⁷⁷ In overturning Judge Berman's decision though, the Second Circuit rejected this contention, and established that Commissioner Goodell was within his discretion to be the hearing officer.¹⁷⁸

There have been other instances in which courts have determined a sports commissioner to not be impartial in hearing a player's appeal. For example, in *Morris v. New York Football Giants, Inc.*, the court determined that the commissioner could not serve as

Arbitrator, Impartial Arbitrator, or the Appeals Panel, as provided for in the *Brady* Settlement Agreement.

Id. at art. III § 2.

¹⁷³ See *id.* at art. III § 2.

¹⁷⁴ See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, Nos. 15 Civ. 5916, 15 Civ. 5982 (RMB) (JCF), 2015 WL 5148739, at *1 (S.D.N.Y. Sept. 3, 2015).

¹⁷⁵ See *id.* at *12, *16–20.

¹⁷⁶ See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

¹⁷⁷ See *Nat'l Football League Mgmt. Council*, 2015 WL 5148739, at *20.

¹⁷⁸ See *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, No. 15-2801, 2016 WL 1619883, at *12–17 (2d Cir. 2016).

a neutral arbitrator.¹⁷⁹ In *Morris*, two players sought compensation pursuant to their individual player contracts after they were by their team.¹⁸⁰ Under the terms of their individual contracts with their team (because at the time, there was no CBA in place), their actions were brought before the Commissioner, who was to act as the neutral arbitrator to settle the dispute.¹⁸¹ After the Commissioner decided against the players, the court overturned his decision, holding that based on the underlying facts, the Commissioner was not neutral.¹⁸² Thus, although the court in *Morris* decided that the Commissioner was not neutral, the party seeking to vacate the arbitrator's award based on such evidence still needs to meet a certain burden in demonstrating that such partiality was present, by making an adequate showing of prejudice by the arbitrator.¹⁸³

A recent example of the Commissioner appointing himself as the hearing officer on appeal after issuing the initial punishment occurred during the "Bountygate" scandal.¹⁸⁴ When the players appealed their punishment, the Commissioner appointed himself as the hearing officer, prompting the players to file suit due to his lack of impartiality.¹⁸⁵ After the suit was brought, Commissioner Goodell decided to delegate the appeal to a hearing officer, pursuant to Article XL of the CBA at the time,¹⁸⁶ appointing ex-commissioner Paul Tagliabue.¹⁸⁷ Though the Commissioner ultimately decided to recuse himself, this was still an instance in which the Commissioner's decision to appoint himself as the hearing officer raised impartiality concerns.¹⁸⁸

¹⁷⁹ See *Morris v. N.Y. Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1016–17 (Cty. S. Ct. 1991).

¹⁸⁰ See *id.* at 1014.

¹⁸¹ See *id.*

¹⁸² See *id.* at 1016–17.

¹⁸³ See *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 554 (N.D. Tex. 2006) (holding that plaintiff did not demonstrate that a reasonable person would have concluded that the panel or arbitrator was partial to defendant).

¹⁸⁴ See Pacifici, *supra* note 115, at 106–07.

¹⁸⁵ See *id.* at 106–10.

¹⁸⁶ See 2011 NFL CBA, *supra* note 10, at art. 46 § 2(a).

¹⁸⁷ See Pacifici, *supra* note 115, at 110–12.

¹⁸⁸ See Jeremy R. Abrams, *Making the Right Call: Why Fairness Requires Independent Appeals in U.S. Professional Sports Leagues*, 97 MARQ. L. REV. 469, 484–89 (2013).

As a practical matter, the commissioner cannot serve as the hearing officer every time a player challenges a punishment under the CBA or Personal Conduct Policy; there are far too many fines and suspensions handed out.¹⁸⁹ When he does decide to hear appeals though, the impartiality problem naturally arises, as the Commissioner's role as the "judge, jury, and executioner"¹⁹⁰ may violate the players' due process rights.¹⁹¹ Such a situation is problematic because it permits the Commissioner to hear the appeal of a punishment he initially imposed, which seems to infringe upon the players' due process right to have an impartial arbitrator. Although the CBA does afford these players the ability to challenge the impartiality of the hearing officer in court,¹⁹² the judicial process is a lengthy and costly one, and a process that could be avoided altogether if the commissioner is not been the person that hears the appeal in the first place.¹⁹³

2. Personal Conduct Policy

The NFL's first Personal Conduct Policy was implemented in 2000, which prohibited a wide variety of off-field violent behavior¹⁹⁴ and granted the commissioner exclusive disciplinary author-

¹⁸⁹ See *2014 NFL Fines & Suspensions*, SPOTRAC, <http://www.spotrac.com/nfl/fines-suspensions/2014> [<https://perma.cc/UT79-UGXE>] (last visited Feb. 26, 2016).

¹⁹⁰ See Andrew Brandt, *Still Judge, Jury, and Executioner*, SPORTS ILLUSTRATED: MONDAY MORNING QUARTERBACK (Nov. 30, 2014), <http://mmqb.si.com/2014/11/30/ray-rice-wins-appeal-roger-goodell-conduct> [<https://perma.cc/Y262-WT4F>].

¹⁹¹ See Ken Belson, *Roger Goodell to Hear Tom Brady's Appeal*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/2015/06/03/sports/football/roger-goodell-to-hear-tom-bradys-appeal.html> [<https://perma.cc/34SC-JX55>]; see also Tony Manfred, *The Problem With Roger Goodell Putting Himself in Charge of Tom Brady's Suspension Appeal*, BUS. INSIDER (May 15, 2015, 10:41 AM), <http://www.businessinsider.com/goodell-hearing-brady-appeal-a-problem-2015-5> [<https://perma.cc/Z3F4-7JGQ>].

¹⁹² See *supra* note 173.

¹⁹³ For example, the "Deflategate" saga has continued for over one year, and after the NFL won its appeal in April 2016, Tom Brady appears to want to continue to fight the ruling. See Dan Graf, *supra* note 57.

¹⁹⁴ See 2014 PCP, *supra* note 21, at 2. Though almost all of the prohibited forms of conduct in the 2014 Personal Conduct Policy are illegal, therefore justifiably punishable by the League, there is a prohibition for "[c]onduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel." *Id.* This means that there is a possibility for being suspended for conduct that may be legal. *Id.*

ity for off-field conduct.¹⁹⁵ Though the League has not implemented further versions of the policy on an annual basis, they have revised and added new versions of the policy to address specific concerns.¹⁹⁶ The Personal Conduct Policy provides further elaboration as to what players may be punished for, as well as adds to the Commissioner's disciplinary power, acting as a supplement to the League's CBA.¹⁹⁷

The most recent version of the Personal Conduct Policy was passed by Commissioner Goodell on December 10, 2014, only one year after the preceding version of the policy, in response to cases of domestic violence that some the League's players were involved in.¹⁹⁸ The 2014 policy was enacted unilaterally by the Commissioner after the owners agreed to it, without any input from the NFLPA.¹⁹⁹ The NFLPA did not take very kindly to the 2014 Personal Conduct Policy because they were not involved in its enactment.²⁰⁰ This raised legitimate questions as to whether the policy's implementation was proper, not only under the NFL's CBA,²⁰¹ but also under fundamental labor law principles governing unilateral action taken by an employer.²⁰² Here, however, the Commissioner

¹⁹⁵ See Kelly M. Vaughan, *First and Goal: How the NFL's Personal Conduct Policy Complies with Federal Antitrust Law*, 96 CORNELL L. REV. 609, 614 (2011).

¹⁹⁶ For example, the League implemented a new policy in 2008 where it extended potential suspension lengths for violations, and permitted discipline even where a player was not convicted of a crime. *See id.*

¹⁹⁷ *See generally* 2014 PCP, *supra* note 21.

¹⁹⁸ *See generally id.*; 2013 PCP, *supra* note 29.

¹⁹⁹ See Tom Pelissero, *NFL Owners Pass New Personal Conduct Policy*, USA TODAY (Dec. 10, 2014, 4:12 PM), <http://www.usatoday.com/story/sports/nfl/2014/12/10/roger-goodell-nfl-owners-personal-conduct-policy/20199033/> [<https://perma.cc/8G8M-PMPE>].

²⁰⁰ See Michael O'Keeffe, *NFL Players Union Files Grievance vs. NFL over New Personal Conduct Policy*, N.Y. DAILY NEWS (Jan. 23, 2015) <http://www.nydailynews.com/sports/football/nflpa-files-grievance-nfl-new-conduct-policy-article-1.2089402> [<https://perma.cc/T2BB-2MJH>].

²⁰¹ See Casinova O. Henderson, *How Much Discretion Is Too Much for the NFL Commissioner to Have over the Players' Off-the-Field Conduct?*, 17 SPORTS L.J. 167, 180-81 (2010).

²⁰² For example, under section 8(d) of the National Labor Relations Act, an employer is required to "confer in good faith with respect to wages, hours, and other terms of conditions of employment." National Labor Relations Act § 8(d), 29 U.S.C. § 158 (2016); *see NLRB v. Katz*, 369 U.S. 736, 746-47 (1962) (holding that the duty to bargain between management and a union extends to the terms explicitly listed under § 8(d)). *But*

claimed to have enacted the new policy “pursuant to [his] authority under the Constitution and Bylaws,”²⁰³ though the CBA does not grant him the express power to enact policies such as the Personal Conduct Policy. In fact, the CBA “supersede[s] any conflicting provisions in . . . the NFL Constitution and Bylaws, the NFL Rules, or any other document affecting terms and conditions of employment of NFL players.”²⁰⁴ Moreover, though the NFLPA challenged the NFL’s implementation of the 2014 Personal Conduct Policy as a “document affecting terms and conditions of employment” and argued that it should be superseded by the CBA, their non-injury grievance to a third-party arbitrator remains unresolved to this point.²⁰⁵ Opposing the new policy, however, might not end well for either side, as domestic violence has been a major problem for the League,²⁰⁶ and this policy was a serious effort in order to combat it.²⁰⁷ Though it may be argued that a full revision of the Personal Conduct Policy is not necessary, and is instead just a revision to address the domestic violence problem, the new policy adds more than merely a domestic violence provision.²⁰⁸

The 2014 version provides even more disciplinary control to the League than the 2013 version, as players may be placed on the “Commissioner Exempt List”—which allows leave with pay—while an investigation is ongoing.²⁰⁹ This sort of power usually does

see *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958) (holding that not every action taken by an employer must be bargained over).

²⁰³ See 2014 PCP, *supra* note 21, at 1.

²⁰⁴ 2011 NFL CBA, *supra* note 10, at art. II § 1.

²⁰⁵ See Tom Pelissero, *NFL, NFLPA Reach Settlement on Contempt Motion in Adrian Peterson Case*, USA TODAY (Sept. 26, 2015, 9:08 AM), <http://www.usatoday.com/story/sports/nfl/vikings/2015/09/25/nfl-nflpa-adrian-peterson-case-dismiss-civil-contempt-motion/72837158/> [https://perma.cc/LUH4-YVFS].

²⁰⁶ Benjamin Morris, *The Rate of Domestic Violence Arrests Among NFL Players*, FIVETHIRTYEIGHT (July 31, 2014, 12:50 PM), <http://fivethirtyeight.com/datalab/the-rate-of-domestic-violence-arrests-among-nfl-players/> [https://perma.cc/T6KX-8L2T].

²⁰⁷ See *id.*; see also Josh Levs, *NFL Toughens Policy Addressing Assault and Domestic Violence*, CNN (Dec. 10, 2014, 10:45 PM), <http://www.cnn.com/2014/12/10/us/nfl-conduct/> [https://perma.cc/4HT9-3F6J].

²⁰⁸ See generally 2014 PCP, *supra* note 21.

²⁰⁹ See Ken Belson, *N.F.L. Sets Strict Rules for Actions Off Field*, N.Y. TIMES (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/sports/football/roger-goodell-wont-assess-penalties-under-revised-conduct-policy.html> [https://perma.cc/EXN9-E8WV]; see generally 2013 PCP, *supra* note 29.

not exist in other comparable sports, or industries.²¹⁰ Additionally, the 2014 policy directly addresses the domestic violence issue that plagued the League.²¹¹ The revised 2014 Personal Conduct Policy explicitly lists domestic violence, as well as other violent crimes, as conduct which will be disciplined, unlike previous personal conduct policies.²¹² Under the 2014 Personal Conduct Policy, there is a prescribed six-game suspension for a first offense of one of the listed examples, with consideration given to aggravating or mitigating factors in increasing or decreasing the suspension.²¹³ The policy lists other types of violations or potential “detrimental” acts²¹⁴ that would warrant such discipline, but does not limit the potential violations to that specific list.²¹⁵ The 2014 policy also addresses a potential repeat offender, with a lifetime banishment penalty for someone who commits a second violation of one of the specified acts.²¹⁶ A player who has received a lifetime banishment may petition the Commissioner for reinstatement after one year.²¹⁷

²¹⁰ See *infra* Sections I.D.1–3.

²¹¹ See generally Levs, *supra* note 207.

²¹² See 2014 PCP, *supra* note 21, at 2.

²¹³ *Id.* at 6.

²¹⁴ That list includes:

Actual or threatened physical violence against another person, including dating violence, domestic violence, child abuse, and other forms of family violence; Assault and/or battery, including sexual assault or other sex offenses; Violent or threatening behavior toward another employee or a third party in any workplace setting; Stalking, harassment, or similar forms of intimidation; Illegal possession of a gun or other weapon (such as explosives, toxic substances, and the like), or possession of a gun or other weapon in any workplace setting; Illegal possession, use, or distribution of alcohol or drugs; Possession, use, or distribution of steroids or other performance enhancing substances; Crimes involving cruelty to animals as defined by state or federal law; Crimes of dishonesty such as blackmail, extortion, fraud, money laundering, or racketeering; Theft-related crimes such as burglary, robbery, or larceny; Disorderly conduct; Crimes against law enforcement, such as obstruction, resisting arrest, or harming a police officer or other law enforcement officer; Conduct that poses a genuine danger to the safety and well-being of another person; and Conduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel.

2014 PCP, *supra* note 21, at 2 (emphasis added).

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See *id.*

In terms of its language, the new 2014 Personal Conduct Policy uses the same punishment for “conduct detrimental” language that is included in the Commissioner’s Article XLVI power.²¹⁸ Additionally, the Policy does not limit discipline to players who are convicted of a proscribed violation;²¹⁹ a mere accusation is enough to warrant a fine or suspension.²²⁰

The 2014 Policy appears, on its face, to restrict the Commissioner’s power to discipline players for “conduct detrimental.”²²¹ Although an initial disciplinary decision is “made or recommended by a disciplinary officer,” the decision is made under the delegated authority of the Commissioner.²²² Additionally, the 2014 Policy does not provide much of a limitation on the Commissioner’s power at the player grievance stage.

Players challenging any discipline imposed on them under the Personal Conduct Policy must follow the same procedures that are set forth under Article XLVI of the CBA.²²³ Since the Commissioner retains the power to discipline players under the Personal Conduct Policy, his ability to hear the appeal presents a similar issue of impartiality as an arbitrator, and whether this infringes on the due process rights of the players.²²⁴ Although courts will typically defer to the contracts made between unions and Management, when there is clear partiality in the appeal process they may decide to overturn the appeal decision and have it re-heard.²²⁵ As discussed above, players may challenge the commissioner’s neutrality

²¹⁸ Compare 2014 PCP, *supra* note 21, at 1, with 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

²¹⁹ See 2014 PCP, *supra* note 21, at 2; Bethany Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 174–76 (2010) (noting examples where players have been disciplined by the League and subsequently been found not guilty of criminal charges).

²²⁰ See 2014 PCP, *supra* note 21, at 2.

²²¹ See *id.* at 1, 5 (“Everyone who is part of the league must refrain from ‘conduct detrimental to the integrity of and public confidence in’ the NFL You have violated this policy . . . if the evidence gathered by the league’s investigation demonstrates that you engaged in conduct prohibited by the Personal Conduct Policy.”).

²²² *Id.* at 6.

²²³ See *supra* note 163.

²²⁴ See 2011 NFL CBA, *supra* note 10, at art. 46.

²²⁵ See *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 554 (N.D. Tex. 2006) (holding that plaintiff did not demonstrate that a reasonable person would have concluded that the panel or arbitrator was partial to defendant).

in hearing the appeal under Article III when they feel they aren't being provided their right under the CBA to an impartial arbitrator under Articles XVI and XLIII.²²⁶

Whether the various avenues of discipline and the due process and appeal rights the players have throughout the process conform to what is expected in normal labor contexts is a complicated issue. In order to make such a determination, it is crucial to look at how discipline, and the rights of employees, or players, in other contexts is handled.

D. Punishment in Other Contexts

1. Major League Baseball

In MLB, the Commissioner's power to discipline players at the initial stage lies in its Constitution and Bylaws,²²⁷ its CBA,²²⁸ and the recently enacted Domestic Violence Policy.²²⁹ In the CBA, the Commissioner's power is explicitly laid out under Article XII and is similarly worded as the current CBA in the NFL.²³⁰ Under Article XII, the Commissioner may discipline "[p]layers . . . for just cause for conduct that is materially detrimental or materially prejudicial to the best interests of Baseball"²³¹ The CBA then provides a non-exhaustive list of examples of conduct that would fall under this "best interests" clause.²³² Although the "best interests" clause is a broad grant of power, it does come with some limitations, as compared to the NFL.²³³ Although both CBAs have a notice requirement to the disciplined player, the NFL is not required to have the same investigation step prior to issuing discip-

²²⁶ See 2011 NFL CBA, *supra* note 10, at art. III.

²²⁷ Major League Baseball Constitution (2005) [hereinafter MLB Constitution].

²²⁸ 2012 MLB CBA, *supra* note 8.

²²⁹ MLB Joint Domestic Violence, Sexual Assault, and Child Abuse Policy (2015) [hereinafter MLB DAP].

²³⁰ Compare 2012 MLB CBA, *supra* note 8, at art. XII § B, with 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

²³¹ 2012 MLB CBA, *supra* note 8, at art. XII § B.

²³² See *id.*

²³³ Compare 2012 MLB CBA, *supra* note 8, at art. XII, with 2011 NFL CBA, *supra* note 10, at art. 46.

line as the MLB.²³⁴ Additionally, the MLB's grievance procedure, as discussed below, provides a greater limitation on MLB commissioner powers than the NFL provides.

The broad grant of the "best interests" power can be problematic though. Although Article XII prohibits "conduct in violation of federal, state or local law,"²³⁵ players may be disciplined for other bad—albeit legal—behavior, as well. For example, John Rocker was suspended by then-Commissioner Bud Selig in 2000 after a racist rant *Sports Illustrated*, when asked if he would ever play for the New York Mets.²³⁶ Rocker's suspension marked the first time a player had been disciplined for speech.²³⁷ Though inflammatory, Rocker's conduct did not fall under the "in violation of federal, state or local law" language, thus, the decision to discipline was made pursuant to the "best interests" clause. Although a player probably understands that making racist remarks will likely damage his own public image, it is perhaps not as easy for that player to see how his words would cause damage to the entire sport. Indeed, as Rocker was the first to be disciplined for this behavior, players may not always know what actually constitutes conduct that is detrimental to baseball's "best interests."

Possible solutions to rectify the vagueness of the "best interests" clause are also problematic. For example, due to the unpredictable nature of player conduct, instituting an exhaustive list of all possible violations is not feasible. Moreover, leaving discipline power to individual franchise owners would likely create even more ambiguity, as discipline would be imposed on a team-by-team basis, rather than league-wide. By granting power to the Commissioner, in theory, the Commissioner would be looking towards balancing punishment with the best interests of the entire league. "[T]he ra-

²³⁴ Under MLB's CBA, the League is required to conduct an investigation into a potential misconduct violation before imposing discipline; the NFL does not have such a requirement. Compare 2012 MLB CBA, *supra* note 8, at art. XII §§ C, D; with 2011 NFL CBA, *supra* note 10, at art. 46.

²³⁵ 2012 MLB CBA, *supra* note 8, at art. XII § B.

²³⁶ See Leibovitz, *supra* note 108, at 199; see also Murray Chass, *Baseball Suspends Rocker Till May for Comments*, N.Y. TIMES (Feb. 1, 2000), <http://www.nytimes.com/2000/02/01/sports/baseball-baseball-suspends-rocker-till-may-for-comments.html> [<https://perma.cc/7F7W-45HJ>].

²³⁷ See Chass, *supra* note 236.

tionale behind granting the Commissioner the power to overrule the owners lies in a fundamental conflict of interest for the owners, whose financial incentives are not wholly attached to the success of MLB, but also to the success of their individual teams.”²³⁸ Despite the potential confusion over what conduct would be prohibited due to the breadth of Commissioner power, the power has been upheld by federal courts.²³⁹

More recently, the MLB decided to enact a Domestic Violence Policy, granting the Commissioner additional power that is not contained in either the Constitution or CBA. The MLB's recent implementation of the Domestic Violence Policy can be traced to the NFL's decision to do so.²⁴⁰ Domestic violence is a serious issue in the MLB, and the League is doing whatever it can to curtail such behavior.²⁴¹ Under the Domestic Violence Policy, the Commissioner enjoys a tremendous amount of discretionary power in rendering a disciplinary decision.²⁴² By the policy's own terms, “the Commissioner can issue the discipline he believes is appropriate in light of the severity of the conduct.”²⁴³ Further, the Commissioner may suspend the player up to seven days while conducting an investigation into the matter, and may even suspend the player, with pay, prior to the conclusion of any legal proceeding.²⁴⁴ Under the policy, the Commissioner retains the exclusive power to discipline players, though he may defer to the player's respective team to impose punishment.²⁴⁵ Lastly, similar to the NFL's Personal Conduct

²³⁸ Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2424 (1997).

²³⁹ See generally *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931); see also *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 538 (7th Cir. 1978) (upholding Commissioner Bowie Kuhn's right to determine the best interests of baseball).

²⁴⁰ See David Lennon, *MLB Learns From NFL's Mistake, Implementing Domestic Violence Education Program*, NEWSDAY (Feb. 28, 2015, 8:40 PM), <http://www.newsday.com/sports/columnists/david-lennon/mlb-learns-from-nfl-s-mistake-implementing-domestic-violence-education-program-1.9990592> [https://perma.cc/58VY-JAKU].

²⁴¹ See Mike Bates, *MLB's Record on Domestic Violence Worse Than NFL's*, SBNATION (July 28, 2014, 1:10 PM), <http://www.sbnation.com/mlb/2014/7/28/5936835/ray-rice-chuck-knoblach-minnesota-twins-mlb-domestic-abuse-violence> [https://perma.cc/R6SR-EMF6].

²⁴² See MLB DAP, *supra* note 229, § C.

²⁴³ *Id.*

²⁴⁴ See *id.* § B.

²⁴⁵ See *id.* § C.

Policy, the player does not need to be convicted.²⁴⁶ Aroldis Chapman, pitcher for the New York Yankees, was the first player suspended under this new policy, for 30 games on March 1, 2016.²⁴⁷

The MLB and NFL disciplinary structures are very similar in terms of how initial punishment is handled. Under the CBA, the MLB's power to discipline players to protect the "best interests" of baseball is similar to the NFL's power to discipline players for "conduct detrimental" to the League.²⁴⁸ Under both clauses, players can be disciplined on a subjective determination made by the Commissioner. Since the MLB laid the ground work for Commissioner power,²⁴⁹ it seems that the NFL modeled their Commissioner's power after the MLB. Moreover, in each sport, in addition to the power granted to each Commissioner under their respective CBAs, there are additional sources that provide the Commissioners with the ability to levy punishment to discipline players.²⁵⁰

Notably, the MLB's recent Domestic Violence Policy provides the MLB Commissioner with slightly more discretionary power than does the NFL's. In the MLB's Domestic Violence Policy, there are no maximum or minimum limitations to the discipline that may be imposed on a player.²⁵¹ In the NFL's new Personal Conduct Policy, the Commissioner can issue a baseline, six-game suspension on the first violation, and a lifetime ban for a subsequent domestic violence violation.²⁵² Under the MLB's policy, the Commissioner may issue a lifetime ban immediately, if the situa-

²⁴⁶ See *id.*

²⁴⁷ Paul Hagen & Bryan Hoch, *Chapman Gets 30-Game Suspension from MLB*, MLB.COM (Mar. 1, 2016), <http://m.mlb.com/news/article/165860226/yankees-aroldis-chapman-suspended-30-games> [https://perma.cc/HF6Q-5DV5]. Jose Reyes, the Colorado Rockies' shortstop, was also involved in a domestic violence dispute, and though charges were dropped, he was placed on paid leave February 23, 2016, not to be reinstated until May 31, 2016; missing fifty-one games. See Andrew Joseph, *Jose Reyes Returns to Rockies, Vows to Be "A Better Man, A Better Husband,"* USA TODAY (May 19, 2016), <http://www.usatoday.com/story/sports/mlb/2016/05/19/jose-reyes-returns-rockies-vows-better-man-better-husband/84598918/> [https://perma.cc/KB3V-CH7X].

²⁴⁸ Compare 2012 MLB CBA, *supra* note 8, at art. XII, with 2011 NFL CBA, *supra* note 10, at art. 46.

²⁴⁹ See *supra* note 98.

²⁵⁰ See, e.g., MLB DAP, *supra* note 229; see also 2014 PCP, *supra* note 21.

²⁵¹ See generally MLB DAP, *supra* note 229.

²⁵² See 2014 PCP, *supra* note 21, at 6.

tion were to warrant it. On the other hand, where a six-game suspension in the NFL may not be appropriate in all instances, the MLB may impose a lesser suspension in those situations. Though the NFL's Commissioner may take into account any mitigating or aggravating factors to better fit punishment, he must start with the prescribed six game or lifetime ban before doing so.²⁵³ In the MLB, such a starting point is not necessary, so the MLB's Commissioner may have a better starting point for a minor or severe violations.²⁵⁴

The grievance procedures in MLB are unique to each source of punishment power. Under the CBA, players can challenge punishment stemming from their on-field conduct, or for all other grievances, including off-field conduct.²⁵⁵ For discipline taken against a player stemming from an on-field incident, such as fighting or interfering with an umpire, a grievance would be heard in front of the Executive Vice President, Administration, or the Commissioner himself.²⁵⁶ The grievance procedure for any other appeal is different from the procedure for on-field conduct discipline.²⁵⁷ Under this sort of grievance filing, the grievance must first be brought up to the player's club, then to the League's Labor Relations Department, before finally being heard in front of an arbitration panel.²⁵⁸ The arbitration panel is formed by each party selecting one arbitrator, and then agreeing on an "impartial" third arbitrator.²⁵⁹ If the parties cannot agree on a third, "impartial" arbitrator, then a list from the American Arbitration Association is provided until the parties narrow the list down to one.²⁶⁰ The third impartial arbitrator may be fired by either party, so long as they are not handling a case at the time.²⁶¹ Notably, the CBA does not grant the Commissioner authority to appoint himself as the arbitrator to

²⁵³ *See id.*

²⁵⁴ *See* MLB DAP, *supra* note 229.

²⁵⁵ *See* 2012 MLB CBA, *supra* note 8, at art. XI §§ B-C.

²⁵⁶ *See id.* at art. XI § C(1)(a)-(b).

²⁵⁷ *See id.* at art. XI § B.

²⁵⁸ *See id.*

²⁵⁹ *See id.* at art. XI § A(9).

²⁶⁰ *See id.*

²⁶¹ *See id.*

hear an appeal filed for off-field conduct, as compared to the NFL.²⁶²

Under the MLB's new Domestic Violence policy, the same three-person arbitration panel is used in hearing a player's grievance over punishment issued.²⁶³ Because there are no maximum or minimum limitations to the Commissioner's discipline, the panel uses a "just cause" standard, where the punishment must reflect the "cause," or severity of the violation.²⁶⁴ The arbitration panel may also, on their own, weigh the various aggravating and mitigating factors that played a role in the punishment determination.²⁶⁵

In comparison to the NFL, the MLB grievance procedures do not permit the Commissioner to hear appeals for off-field discipline. These types of appeals are heard in front of a three-member arbitration panel, where each party gets to select an arbitrator, before agreeing upon the third.²⁶⁶ In the NFL, the Commissioner may hear the appeal himself, and when he does appoint a hearing officer, the Commissioner merely has to consult with the NFLPA Executive Director prior to appointing a hearing officer.²⁶⁷ The NFLPA does not get to choose one of the hearing officers, meaning the Commissioner has the exclusive power to determine who will hear the case.²⁶⁸ The MLB, on the other hand, grants more power to the players in the appeal process, in terms of determining who will be hearing the appeal.

2. National Basketball Association

Unlike the NFL or the MLB, the NBA's commissioner power to discipline at the initial stage is derived only from the NBA's Constitution and Bylaws, and is limited by its CBA.²⁶⁹ Under the NBA's Constitution and Bylaws, the Commissioner may discipline a player "for any statement he makes or endorses which is prejudi-

²⁶² See *id.* at art. XI.

²⁶³ See MLB DAP, *supra* note 229, at § C.

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See 2012 MLB CBA, *supra* note 8, at art. XI § A(9).

²⁶⁷ See 2011 NFL CBA, *supra* note 10, at art. 46 § 2(a).

²⁶⁸ See *id.*

²⁶⁹ See NBA Constitution and Bylaws, at art. 35 §§ (c)-(d) (2012) [hereinafter NBA Constitution].

cial or detrimental to the best interests of basketball and to suspend or fine the player for conduct that is detrimental to the NBA.”²⁷⁰ Further, the Commissioner has the power to discipline players for being “guilty of conduct that does not conform to standards of morality and fair play.”²⁷¹

Under the language of the NBA's Constitution and Bylaws, the Commissioner is accorded the same discretionary power in issuing punishment to a player as the MLB and NFL.²⁷² The Latrell Sprewell incident in the late 1990s was an example of how arbitrators and courts treat the NBA Commissioner's power under the Constitution and Bylaws, and the CBA.²⁷³ In 1997, Latrell Sprewell, a then-NBA player, physically assaulted his coach P.J. Carlesimo, to the point of choking him with his bare hands.²⁷⁴ David Stern, the NBA Commissioner at the time, suspended Sprewell for a full calendar year following the incident, pursuant to his authority under the Constitution's “best interests” clause.²⁷⁵ On appeal, the Grievance Arbitrator reduced the discipline issued by the Commissioner, after determining that reducing the suspension to the remainder of the season was more fair.²⁷⁶ The court upheld the arbitrator's ruling when Sprewell brought suit to have the arbitration award vacated.²⁷⁷ This case was crucial in defining the modern day limitations on the NBA's Commissioner power to discipline players.

Much like the MLB Commissioner's disciplinary power, the NBA's Commissioner has similar discretionary power to discipline players as the NFL's Commissioner. The NBA has the same “best interests” clause implemented in its Constitution that the MLB

²⁷⁰ Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS L.J. 137, 151 (2008); see NBA Constitution, *supra* note 269, at art. 35 § (d)(i).

²⁷¹ NBA Constitution, *supra* note 269, at art. 35 § (d).

²⁷² Compare *id.* at art. 35 §§ (c)–(d), with 2012 MLB CBA, *supra* note 8, at art. XII § B, and 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

²⁷³ See generally Roger A. Javier, *You Cannot Choke Your Boss & Hold Your Job Unless You Play in the NBA: The Latrell Sprewell Incident Undermines Disciplinary Authority in the NBA*, 7 VILL. SPORTS & ENT. L.J. 209, 210–12 (2000).

²⁷⁴ See *id.* at 211.

²⁷⁵ Lockwood, *supra* note 270, at 153–54.

²⁷⁶ See *id.* at 155.

²⁷⁷ See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 986–88 (9th Cir. 2001).

has in its CBA, and this “best interests” clause, as discussed above, functions in a similar way that the NFL’s “conduct detrimental” to the League clause functions.²⁷⁸ Although the NBA does not have separate documents specifically for domestic violence or drug use prevention, as the MLB and NFL do, punishment under the “best interests” clause has come with stricter scrutiny on appeal.²⁷⁹

Prior to the Sprewell case, the NBA Commissioner’s decision over player punishment was not heavily scrutinized by an arbitrator. Although history has supported a Commissioner’s ability to act within a broad discretionary range of power in order to protect the best interests of their respective League, the overturning of Sprewell’s suspension set a fair and reasonable standard on the discipline imposed by the NBA Commissioner. This is not to say NBA Commissioners have acted egregiously in the past, it simply means their punishment decisions are to be analyzed more critically upon appeal.

The grievance procedures accorded to players under the NBA’s CBA is different from the analogous MLB and NFL procedures.²⁸⁰ The NBA uses a Grievance Arbitrator and a Player Discipline Arbitrator.²⁸¹ A System Arbitrator handles disputes primarily arising out of salary or contract disputes between the Player and his team, and is thus not central to the topic of discipline.²⁸²

Whether a discipline appeal goes to the Grievance Arbitrator or the Player Discipline Arbitrator depends on the severity of the discipline.²⁸³ If the discipline is a fine of less than \$50,000, a suspension less than twelve games, or a combination of the two, then the

²⁷⁸ Compare NBA Constitution, *supra* note 269, at art. 35 § (d)(i), with 2012 MLB CBA, *supra* note 8, at art. XII § B, and 2011 NFL CBA, *supra* note 10, at art. 46 § 2(a).

²⁷⁹ See *Sprewell*, 266 F.3d at 986–88.

²⁸⁰ Compare NBA Collective Bargaining Agreement, art. XXXI § 9 (2011) [hereinafter NBA CBA], with 2012 MLB CBA, *supra* note 8, at art. XI, and 2011 NFL CBA, *supra* note 10, at arts. 43–44 § 2(a).

²⁸¹ See NBA CBA, *supra* note 280, at art. XXXI §§ 1(a)(i), 9(a); see also Jeffrey A. Mishkin, *Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts*, 35 VAL. U. L. REV. 449, 453–58 (2001).

²⁸² See NBA CBA, *supra* note 280, at art. XXXII § 1.

²⁸³ See *id.* at art. XXXI § 9.

player must first appeal to the Commissioner.²⁸⁴ After the Commissioner hears the appeal and renders a decision, the player may then file a subsequent appeal to the Player Discipline Arbitrator, whose decision is final and binding.²⁸⁵ The Player Discipline Arbitrator is a single person, with NBA experience (ex-player, coach, front office executive, etc.), and is agreed upon by both sides.²⁸⁶ Either side may terminate him through a written submission during the period of November 1 through December 1, each year of the CBA's duration.²⁸⁷ The procedure of the initial Commissioner hearing, followed by an appeal to the Player Discipline Arbitrator, is also used for discipline imposed due to in-game conduct.²⁸⁸

If, however, the suspension is more than twelve games, or the fine exceeds \$50,000, then the appeal goes to the Grievance Arbitrator.²⁸⁹ The Grievance Arbitrator, as used in the Sprewell incident, is decided at the outset of the CBA and is a single person agreed upon by both the NBAPA and the owners.²⁹⁰ The Grievance Arbitrator remains in that position for the duration of the CBA;²⁹¹ however, there is a six day window from July 27 until August 1 each year in which either party may remove the Grievance Arbitrator, or the Grievance Arbitrator may step down on his own.²⁹² The Grievance Arbitrator handles the appeal of off-court discipline and on-court discipline that is a fine in excess of \$50,000 or a suspension in excess of twelve games.²⁹³

The NBA's grievance process somewhat resembles a combination of the NFL and MLB grievance procedures. In the NFL, the Commissioner has the discretion to appoint himself to hear the appeal for just about any case that he wants to.²⁹⁴ In the MLB, the Commissioner never has the right to hear an appeal following a dis-

²⁸⁴ See *id.* at art. XXXI § 9(a)(1)–(5).

²⁸⁵ See *id.* at art. XXXI § 9(a)(5)(a)–(f).

²⁸⁶ See *id.* at art. XXXI § 9(a)(5)(d).

²⁸⁷ See *id.* at art. XXXI § 9(a)(5)(e).

²⁸⁸ See *id.* at art. XXXI § 9(a).

²⁸⁹ See *id.* at art. XXXI § 9(b).

²⁹⁰ See *id.* at art. XXXI § 7(a).

²⁹¹ See *id.*

²⁹² See *id.* at art. XXXI § 7(a)–(b).

²⁹³ See *id.* at art. XXXI § 9(b).

²⁹⁴ See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

ciplinary decision that he made.²⁹⁵ Here, the Commissioner does have the authority to hear an appeal following his own disciplinary decision, but only for smaller punishments that are issued.²⁹⁶ Additionally, even when the NBA's Commissioner hears an appeal for a small punishment, the Commissioner's decision can be appealed further to the Player Discipline Arbitrator,²⁹⁷ which is not a possibility in the NFL's appeal structure.²⁹⁸ Drawing a distinction between what constitutes on-court or off-court behavior is not always clear, though.

In the infamous melee that took place at the Palace of Auburn Hills in Detroit, the Detroit Pistons and Indiana Pacers got into a huge fight that has come to be known as the "Malice in the Palace."²⁹⁹ After Ben Wallace was fouled by Ron Artest, players from both teams got into a skirmish on the court.³⁰⁰ The fight spilled into the crowd, and after a fan threw a beer at Artest, he went into the stands to fight the fan.³⁰¹ Following the fight, three players that were suspended subsequently filed appeals, and though the fight transpired on the court, the Grievance Arbitrator heard the appeal.³⁰² The Commissioner believed that he should be the one to hear the appeal, because the fight took place on the court, or in-game.³⁰³ After the Arbitrator reduced Jermaine O'Neal's suspension from twenty-five to fifteen games,³⁰⁴ Commissioner Stern brought suit and continued to argue that the discipline was issued for conduct that occurred on the court, and was thus under his exclusive jurisdiction.³⁰⁵ The judge sided with the arbitrator though,

²⁹⁵ See 2012 MLB CBA, *supra* note 8, at art. XI.

²⁹⁶ See NBA CBA, *supra* note 280, at art. XXXI § 9(a).

²⁹⁷ See *id.* at art. XXXI § 9(a)(5)(a)–(f).

²⁹⁸ See 2011 NFL CBA, *supra* note 10, at art. 46.

²⁹⁹ See David Sirotkin, *Disciplining the Disciplinary Systems in Professional Sports: An Attempt to Fix the Arbitrary and Overreaching Disciplinary Powers of Sports Commissioners*, 11 CARDOZO J. CONFLICT RESOL. 289, 306 (2009).

³⁰⁰ See Jonathan Abrams, *The Malice at the Palace*, GRANTLAND (March 20, 2012), <http://grantland.com/features/an-oral-history-malice-palace/> [<https://perma.cc/89C5-FX7C>].

³⁰¹ See *id.*

³⁰² See Sirotkin, *supra* note 299, at 306.

³⁰³ See *id.* at 306–07.

³⁰⁴ See *id.* at 307.

³⁰⁵ Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528, 2005 WL 22869, at *7 (S.D.N.Y. 2005).

and reasoned that the conduct was so external to the game that it could not possibly have been contemplated as constituting conduct “on the playing court.”³⁰⁶ The court stated that fighting with a spectator, which O’Neal was involved in, “has never been characterized as conduct on the playing court.”³⁰⁷ Ultimately, the court affirmed the arbitrator’s reduction to O’Neal’s suspension.³⁰⁸

Comparing the NFL Commissioner’s discretionary authority to other sports entire disciplinary process is useful to gauge its appropriateness. Comparing the power to other industries, however, will shed even more light on what kind of power is appropriate in disciplining employees.

3. United Auto Workers’ Union–Ford Motor Company

It is important to compare the NFL’s disciplinary system to another industry, here the auto industry, to bring a different perspective as to how unionized employees, outside of the sports context, are disciplined by their superiors. In order to compare the NFL to the auto industry, the agreement between the United Automobile Workers Union (“UAW”) and Ford Motor Company will be examined. The UAW is one of the primary labor organizations representing employees in the auto industry,³⁰⁹ while Ford is one of the most historically successful automobile companies.³¹⁰ Looking at how Ford employees can be disciplined will display a pretty good idea as to how the auto industry deals with employee discipline.

In the UAW–Ford CBA, the power authorized to the employer, or supervisor in this instance, can be found in the Discipline and Discharge section located under Company Responsibility.³¹¹ That section states “[t]he Company retains the sole right to discipline

³⁰⁶ See *id.* at *10–11.

³⁰⁷ *Id.* at *10.

³⁰⁸ See *id.* at *11.

³⁰⁹ See Joel Cutcher-Gershenfeld et al., *The Decline and Resurgence of the U.S. Auto Industry*, ECON. POL’Y INST. (May 6, 2015), <http://www.epi.org/publication/the-decline-and-resurgence-of-the-u-s-auto-industry/> [<https://perma.cc/2AHT-9FBH>].

³¹⁰ See *Automobiles*, HISTORY.COM, <http://www.history.com/topics/automobiles> [<https://perma.cc/ZQ62-9AZ6>] (last visited Feb. 26, 2016).

³¹¹ See Agreements Between UAW and the Ford Motor Company (2011), at art. V § 2 [hereinafter UAW CBA].

and discharge employees for cause, provided that in the exercise of this right it will not act wrongfully or unjustly or in violation of the terms of this Agreement.”³¹² The section then goes on to say that any prior violations that took place more than two years ago are not counted in assessing the appropriate discipline.³¹³ However, the CBA never really provides a more elaborate definition of what should constitute “cause” for discipline.³¹⁴ The Company Responsibility section also provides for an opportunity to discuss the potential discipline between the employer and employee, presumably to give the employee a chance to defend himself before discipline is imposed.³¹⁵

Ford’s Code of Conduct offers more examples of types of workplace behavior could warrant disciplinary measures.³¹⁶ Some of the workplace behavior that could be disciplined are: discriminatory hiring practices,³¹⁷ any form of harassment in the workplace,³¹⁸ health and safety violations,³¹⁹ and violation of the substance abuse policy.³²⁰ Under each of these sections in the handbook, there are no set guidelines as to what punishment could be, where any violation of the handbook would subject the employee to discretionary punishment.³²¹ The language that is used to give any guidance as to what the punishment could be is that “Violation . . . may result in discipline, up to and including termination or release.”³²²

Recently, in a Ford plant in Chicago, a female employee filed a civil suit against the company because she had been sexually harassed in the workplace.³²³ Ford responded to this suit by terminat-

³¹² See *id.* at art. V § 2.

³¹³ See *id.*

³¹⁴ See *id.*

³¹⁵ See *id.*

³¹⁶ See Ford Code of Conduct Handbook: Corporate Policies and Directives (Nov. 2007) at 9–14 [hereinafter Ford Code].

³¹⁷ See *id.* at 11.

³¹⁸ See *id.* at 12.

³¹⁹ See *id.* at 13.

³²⁰ See *id.* at 14.

³²¹ See generally *id.*

³²² *Id.* at 14.

³²³ See Alejandro Cancino, *Ford Employees “Disciplined, Discharged” After Harassment Complaints*, CHI. TRIB., May 7, 2015, <http://www.chicagotribune.com/business/ct-ford-plant-manager-0508-biz-20150507-story.html> [<https://perma.cc/724S-JCGM>].

ing several of the employees who had allegedly been a part of the harassment.³²⁴ Although Ford did not disclose the amount of employees who had been part of the harassment, it stated that the plant manager had been moved to Canada.³²⁵ As the woman had apparently filed complaints in the past, and nothing had been done to curb the behavior, this would fall within the company's handbook under the "Anti-Harassment" section.³²⁶ Under that section, turning a blind eye to an employee's harassment complaint would constitute a violation.³²⁷

In terms of outside the workplace behavior, such as committing a crime, the CBA and company handbook do not provide explicit information. It seems that an employee's supervisor has the discretion to determine if an employee's out-of-work behavior would fall within the "for cause" standard that is located in the CBA.

By not providing further clarity regarding what constitutes "cause" for discipline, the CBA is fairly ambiguous. If employees behave in some manner for a period of time and no disciplinary action is taken, then it would be difficult to punish an employee in the future for behaving the same way—even if the behavior is undesirable. The punished employee would point to the lack of discipline issued in the past for that same behavior, providing a rather strong argument against the presence of "cause."³²⁸ This is likely a customary practice, because trying to enumerate a complete list of examples of "cause" may not be feasible. Employee behavior is unpredictable, and trying to enumerate every possible example of something that would justify "cause" is not practical. Where an employee challenges discipline after an initial determination of "cause," employees can take advantage of a formal grievance procedure.³²⁹

³²⁴ *See id.*

³²⁵ *See id.*

³²⁶ *See* Ford Code, *supra* note 316, at 12.

³²⁷ *See id.*

³²⁸ *See generally* *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943) (holding that the discharge of an employee for his behavior did not constitute "cause" where the employee had never been reprimanded for the same conduct in the past).

³²⁹ *See* UAW CBA, *supra* note 311, at art. VIII.

Ultimately, the initial discipline structure in the UAW–Ford relationship is similar to the NFL’s in multiple ways. To start, both have a requirement before punishment is warranted; the UAW only permits punishment “for cause” and the NFL only permits punishment for “conduct detrimental” to the League.³³⁰ Although both standards are broad, the NFL and Ford both provide further elaboration as to what would fall under each respective standard. At Ford, the company provides the employee guidebook, which sets out specific conduct that may be punished.³³¹ The NFL has a Personal Conduct Policy that, although separate from the CBA (much like Ford’s employee conduct guide), further elaborates certain forms of conduct that would justify punishment.³³²

Ford employees may challenge disciplinary action taken against them pursuant to section 2’s “Disciplinary Cases” under Article VIII.³³³ After being disciplined, a notice of the discipline is sent to an employee’s “Unit Committeeperson.”³³⁴ The Unit Committee consists of three to four people, and they represent an employee during a first stage grievance hearing.³³⁵ A first stage grievance hearing is essentially an informal meeting between the employee and the employer to settle the grievance, if possible.³³⁶ In a disciplinary grievance action though, a hearing prior to the discipline taking effect is held, where the employee and his Unit Committee representative are typically present.³³⁷ In challenging an imposed discipline following the hearing, the employee’s grievance proceeds to Stage Two of the grievance procedure.³³⁸

At Stage Two, a formal written account of the disciplinary action is presented to the company’s representative prior to a weekly held grievance meeting.³³⁹ The company representative will inform the Unit Committee chairperson the decision of any of the griev-

³³⁰ See *id.* at art. V § 2; 2011 NFL CBA, *supra* note 10, at art. 46 § 1.

³³¹ See generally Ford Code, *supra* note 316.

³³² See 2014 PCP, *supra* note 21.

³³³ See UAW CBA, *supra* note 311, at art. V § 2.

³³⁴ See *id.* at art. VIII § 2.

³³⁵ See *id.* at art. VII.

³³⁶ See *id.* at art. VIII § 2(a).

³³⁷ See *id.* at art. VIII § 6(d).

³³⁸ See *id.*

³³⁹ See *id.* at art. VIII § 3.

ances that were brought before him after no later than one week.³⁴⁰ If the decision of the company's representative does not satisfy either the Unit Committee or the employee, either may pursue further action at the Third Stage.³⁴¹

At the Third Stage, the Unit Committee Chairperson writes a formal, and detailed, account and appeal to the Plant Review Board.³⁴² The Plant Review Board for a multi-unit plant consists of at least two members on behalf of the Unit and at least two members on behalf of the company.³⁴³ The Plant Review Board, ultimately renders a decision on behalf of the company, even though the Unit does have a voice in the matter.³⁴⁴

In the final stage, the grievance is appealed to an impartial "Umpire," who is agreed upon by both sides.³⁴⁵ In order to have a grievance appear before the Umpire, the National Ford Department of the International Union has to appeal the third stage decision.³⁴⁶ The Umpire may not hear every appeal that is set before him though, such as matters within company discretion.³⁴⁷ Ultimately, when the Umpire does hear and rule on a grievance, the decision is final and binding,³⁴⁸ and the union is required to not encourage or accompany a member in pursuing an appeal of the Umpire's ruling to court.³⁴⁹

The grievance procedure set forth in the CBA between UAW and Ford seems to provide a more detailed avenue for a grievance to be processed than the NFL's. For example, there are more steps that an employee can go through before having to resort to bringing suit in court, where the determinations of the arbitrator, or possibly Commissioner in the NFL's case, are almost always upheld.³⁵⁰ Moreover, in the NFL's CBA and Personal Conduct Policy, the

³⁴⁰ *See id.*

³⁴¹ *See id.* at art. VIII § 4.

³⁴² *See id.*

³⁴³ *See id.* at art. VIII § 5.

³⁴⁴ *See id.*

³⁴⁵ *See id.* at art. VIII § 7(d).

³⁴⁶ *See id.* at art. VIII § 7.

³⁴⁷ *See id.* at art. VIII § 12(b)(4).

³⁴⁸ *See id.* at art. VIII § 13.

³⁴⁹ *See id.*

³⁵⁰ *See supra* note 123.

appeal goes directly before hearing officers appointed by the Commissioner, or before the Commissioner himself.³⁵¹ In the UAW-Ford relationship, there is no foreseeable scenario in which the person responsible for imposing discipline on the employee may also handle the appeal.³⁵² The UAW-Ford's more comprehensive grievance process seems to be a more equitable remedy than the NFL's.

4. New York City Police Department

Aside from the auto industry, the service industry provides another opportunity to compare the NFL Commissioner's disciplinary, and appeal power. This section will discuss the discretionary power that the Commissioner of the New York City Police Department ("NYPD") has to not only discipline police officers for their on-site and off-site behavior, but also the role that the Police Commissioner has in disciplinary appeals.

Unlike the previously discussed disciplinary proceedings, the Police Commissioner's disciplinary authority lies within New York's State Code, as opposed to a collectively bargained agreement, as decided by the New York's Court of Appeals in the 1999 case, *Montella v. Bratton*.³⁵³ The court in *Montella* ruled: "[P]rovisions in the Charter and Code make clear that the Legislature determined to 'leave the disciplining of police officers, including the right to determine guilt or innocence . . . to the discretion of the Police Commissioner, subject, of course, to review by the courts pursuant to CPLR article 78.'"³⁵⁴

The ruling in *Montella* was reaffirmed in the 2006 case, *Patrolmen's Benevolent Association of the City of New York, Inc. v. New York State Public Employment Relations Board*.³⁵⁵ There, the Patrol Benevolent Association, the police officer representative, was chal-

³⁵¹ See 2011 NFL CBA, *supra* note 10, at art. 46 § 2.

³⁵² Compare UAW CBA, *supra* note 311, at art. VIII, with 2011 NFL CBA, *supra* note 10, at art. 46.

³⁵³ See *Montella v. Bratton*, 93 N.Y.2d 424, 430 (1999) (holding that police officer discipline is authorized exclusively to the police Commissioner, pursuant to New York City's Administrative Code).

³⁵⁴ *Id.* at 430.

³⁵⁵ *Patrolmen's Benevolent Ass'n of City of N.Y. v. N.Y. State Pub. Emp't Relations Bd. (PBA)*, 6 N.Y.3d 563, 577 (2006).

lenging the Public Employment Relations Board's determination that the changing of certain discipline procedures was not something that needed to be bargained over.³⁵⁶ The court had to juggle "Taylor Law,"³⁵⁷ which requires a public employer to negotiate a change in "terms and conditions of employment,"³⁵⁸ with New York City's Administrative Code granting disciplinary decisions exclusively to the Police Commissioner.³⁵⁹ The court ultimately ruled in favor of New York City's Charter and Code, rather than Taylor Law, and held that the disciplinary changes were within the Police Commissioner's discretion and did not need to be bargained over.³⁶⁰

The authority for the police Commissioner in disciplinary decisions lies within the New York Administrative Code.³⁶¹ Section 14-115 of the Administrative Code authorizes the Police Commissioner:

[I]n his or her discretion, on conviction by the commissioner, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force³⁶²

³⁵⁶ See *id.* at 570.

³⁵⁷ The Public Employees Fair Employment Act, more commonly known as Taylor Law, is a New York State Statute, requiring, among other things, a public employer to negotiate over any changes made to terms and conditions of employment. See N.Y. CIV. SERVICE LAW § 209-a(1)(d) (2012).

³⁵⁸ See N.Y. CIV. SERVICE LAW § 204(2).

³⁵⁹ See *PBA*, 6 N.Y.3d at 572-74; NEW YORK, N.Y., CHARTER § 434(a); NEW YORK, N.Y., ADMIN. CODE § 14-115(a) (2015).

³⁶⁰ See *PBA*, 6 N.Y.3d at 576-77.

³⁶¹ See NEW YORK, N.Y., ADMIN. CODE § 14-115.

³⁶² *Id.*

Although the investigations that give rise to discipline can occur internally, they may also be recommended by the Civilian Complaint Review Board (“CCRB”).³⁶³ The CCRB is essentially a forum where civilians can submit complaints of potential misconduct committed by a police officer.³⁶⁴ Although the complaints are generally related to behavior of the officers while on-duty, there may also be complaints submitted related to the off-duty behavior of police officers.³⁶⁵ When the CCRB receives a civilian complaint for an officer’s off-duty behavior, it forwards that complaint along to the Internal Affairs Bureau (“IAB”), which handles off-duty police officer misconduct.³⁶⁶ After a hearing and investigation is either initiated by the IAB, or follows a CCRB forwarded complaint, the Police Commissioner is authorized to take action.³⁶⁷

Section 14-115 grants the Police Commissioner the authority to discipline officers not only for being convicted of a crime, but for “immoral conduct or conduct unbecoming an officer.”³⁶⁸ This language gives a very broad amount of discretion to the Police Commissioner in handling disciplinary matters involving officers in his or her department. Whether conduct is “immoral” or “unbecoming” is a subjective determination. For example, recently a New York City Police Officer was disciplined after cursing at and berating an Uber driver.³⁶⁹ In a separate situation, seventeen New York

³⁶³ See *APU and Police Discipline*, NYC Civilian Complaint Review Board, <http://www.nyc.gov/html/ccrb/html/police/police.shtml> [https://perma.cc/A38M-5E45] (last visited Feb. 26, 2016).

³⁶⁴ See *id.*

³⁶⁵ See *Frequently Asked Questions*, NYC Civilian Complaint Review Board, <http://www.nyc.gov/html/ccrb/html/faq/faq.shtml#a1> [https://perma.cc/R2TS-JZY9] (last visited June 2, 2016); Alan Yuhas, *NYPD Officer Disciplined After Foul-Mouthed Rant at Uber Driver*, GUARDIAN (Apr. 1, 2015), <http://www.theguardian.com/us-news/2015/apr/01/nypd-officer-investigation-rant-uber-driver> [https://perma.cc/GR8Q-Z8QS].

³⁶⁶ See *Frequently Asked Questions*, *supra* note 365.

³⁶⁷ See *Patrolmen’s Benevolent Ass’n of City of New York v. New York State Pub. Emp’t Relations Bd.*, 6 N.Y.3d 563, 572–74; NEW YORK, N.Y., CHARTER § 434(a); NEW YORK, N.Y., ADMIN. CODE § 14-115(a).

³⁶⁸ NEW YORK, N.Y., CHARTER § 434(a).

³⁶⁹ See Caroline Bankoff, *Newly Badgeless NYPD Detective Says He’s Sorry for Freaking Out at Uber Driver*, NEW YORK MAG. (Apr. 4, 2015), <http://nymag.com/daily/intelligencer/2015/04/nypd-detective-sorry-for-uber-driver-rant.html> [https://perma.cc/C5F9-VW8Y].

City Police Officers were disciplined after making racist posts on Facebook about the West Indian Day Parade.³⁷⁰ These examples illustrate that even in situations where police officers are not necessarily violating laws, officers may still be disciplined for their conduct while both on-duty and off-duty.

Even with this broad range of discretion there is a limiting section, as officers still are disciplined:

[O]nly on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe.³⁷¹

This caveat provides a sort of procedural due process right to the officers before punishment may be made against them. It acts as a safeguard, preventing punishment imposed by the Police Commissioner before the officer has an opportunity to defend themselves.³⁷² This internal limiting function is something that the NFL doesn't provide until the grievance stage.³⁷³ This due process right is important because the opportunity for an officer to defend him or herself is provided prior to any sort of drag-out grievance process taking place, providing the officer an additional due process right and helping to maintain a calm and amicable working environment. In the NFL, the Commissioner only needs to follow the written notice requirement.³⁷⁴ There is no formal hearing that must take place before imposing discipline on a player.³⁷⁵

³⁷⁰ See Joe Kemp, *NYPD Disciplines 17 Cops Who Posted Racist Facebook Comments About West Indian Day Parade*, N.Y. DAILY NEWS (Aug. 23, 2012), <http://www.nydailynews.com/new-york/nypd-disciplines-17-cops-posted-racist-facebook-comments-west-indian-day-parade-article-1.1142642> [<https://perma.cc/QE75-W4CN>].

³⁷¹ NEW YORK, N.Y., ADMIN. CODE § 14-115(b).

³⁷² See *id.*

³⁷³ Compare *id.*, with 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

³⁷⁴ See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

³⁷⁵ See *id.*

Additionally, the Police Commissioner has the authority to suspend officers while a trial involving the officer is pending under Section 14-123.³⁷⁶ If the officer is found innocent of the charges, however, he is due back pay from the date the suspension began.³⁷⁷ Lastly, the Police Commissioner may place an officer on probation after a conviction, though probation may not last more than a year.³⁷⁸ During the probationary period, however, the Police Commissioner may impose further punishment on the officer.³⁷⁹

The Police Commissioner's disciplinary power over New York City police officers is identical to the NFL Commissioner's disciplinary power over players. Although there is no definitive phrase such as "best interests," "conduct detrimental," or "for cause," the city's Administrative Code does provide an enumerated list of possible grounds for discipline.³⁸⁰ Among that list is the "conduct unbecoming of an officer" provision, which may be read similarly to the previously discussed clauses granted to commissioners or managers.³⁸¹ Additionally, the power to discipline lies exclusively with the New York City Police Commissioner, and he may delegate that responsibility, similarly to the NFL Commissioner.³⁸² In sum, the New York City Police Commissioner's disciplinary power is more than comparable to the NFL Commissioner's disciplinary power, as they are quite similar.

Another interesting aspect of the disciplinary procedure instituted by both the NFL and the NYPD is that in the NFL's new Personal Conduct Policy, the NFL Commissioner is authorized to suspend a player while an investigation is ongoing.³⁸³ In fact, Commissioner Goodell was explicit about consulting with the

³⁷⁶ See NEW YORK, N.Y., ADMIN. CODE § 14-123.

³⁷⁷ See *id.*

³⁷⁸ See NEW YORK, N.Y., ADMIN. CODE § 14-115(d).

³⁷⁹ See *id.*

³⁸⁰ See NEW YORK, N.Y., ADMIN. CODE § 14-115.

³⁸¹ See *id.*

³⁸² See NEW YORK, N.Y., ADMIN. CODE § 14-115(b).

³⁸³ See 2014 PCP, *supra* note 21, at 5. "In cases in which a violation relating to a crime of violence is suspected but further investigation is required, the Commissioner may determine to place a player or other employee on leave with pay on a limited and temporary basis to permit the league to conduct an investigation." *Id.* This is known as the "Commissioner Exempt List." *Id.*

NYPD in adding this power in the 2014 Policy.³⁸⁴ It is likely based off of the Police Commissioner's power under section 14-123 to suspend an officer while any investigation of a legal matter is ongoing.³⁸⁵

A formal grievance procedure can be found in New York City's Administrative Code, under section 14-125³⁸⁶ the grievance procedure looks similar to the policy in place in the NFL.³⁸⁷ Under section 14-125, the officer wishing to file a grievance over a dismissal or demotion must do so in a written application to the mayor of New York City.³⁸⁸ From there, the mayor determines whether or not a rehearing before the Police Commissioner will take place, based on the facts and reasons proffered in support of a rehearing.³⁸⁹ At the rehearing, if the Police Commissioner determines that the demotion or termination was done incorrectly, then he may reinstate or reposition the grieving officer to the position held prior, "and allow him or her the whole of his or her time since such dismissal, to be applied on his or her time of service in the department"³⁹⁰ The Police Commissioner may also fashion an additional, or separate, remedy if he determines that such a remedy is just.³⁹¹ The Police Commissioner, however, may affirm the dismissal or demotion based on the evidence.³⁹²

Lastly, an officer who was dismissed or demoted without a formal hearing may issue a written grievance to the mayor requesting such an opportunity to be heard.³⁹³ From there, the mayor may or may not authorize such a proceeding, in which the Police Com-

³⁸⁴ See Ginger Adams Otis, *Roger Goodell Prepares NFL's Tougher Personal Conduct Policy, Modeled on NYPD Practices, in Wake of Ray Rice Incident*, N.Y. DAILY NEWS (Dec. 10, 2014), <http://www.nydailynews.com/sports/football/roger-goodell-prepares-nfl-nypd-style-conduct-rules-article-1.2040149> [<https://perma.cc/ULS4-T65C>].

³⁸⁵ Compare NEW YORK, N.Y., ADMIN. CODE § 14-123, with 2014 PCP, *supra* note 21, at 5.

³⁸⁶ See NEW YORK, N.Y., ADMIN. CODE § 14-125.

³⁸⁷ Compare NEW YORK, N.Y., ADMIN. CODE § 14-125, with 2011 NFL CBA, *supra* note 10, at art. 46 § 2.

³⁸⁸ See NEW YORK, N.Y., ADMIN. CODE § 14-125(a).

³⁸⁹ See *id.*

³⁹⁰ NEW YORK, N.Y., ADMIN. CODE § 14-125(c).

³⁹¹ See *id.*

³⁹² See *id.*

³⁹³ See NEW YORK, N.Y., ADMIN. CODE § 14-125(e).

missioner is to hold a formal hearing over the matter in which the officer was disciplined.³⁹⁴ After the hearing takes place, the Police Commissioner may reinstate the officer or place him back in his position prior to the demotion, or he may affirm the discipline.³⁹⁵

As stated above, this grievance procedure is similar to the NFL Commissioner's power at the grievance stage.³⁹⁶ In both instances, not only is the Commissioner issuing the initial punishment, but he is also the one rendering a decision on appeal.³⁹⁷ This should not come as a major surprise though, as Commissioner Goodell has previously approved of the manner in which the NYPD handles officer discipline.³⁹⁸ Although the NFL's stated focus of consulting with the NYPD was merely to learn how they handle discipline during an ongoing investigation, they apparently took a similar approach to the grievance process regarding employee discipline. In the NFL's new Personal Conduct Policy, a grievance is handed under the terms of Article XLVI of the CBA.³⁹⁹ Article XLVI, as discussed before, grants the NFL Commissioner the discretionary power to act as the body that has the discretion to hear a grievance filed by a player.⁴⁰⁰

II. CONFLICT

The main issue that the NFL is currently facing stems not from the Commissioner's power to discipline players at the outset, but in the determination of the severity of the punishment and the Players' rights to appeal that punishment. Ultimately, the due process rights afforded to NFL players in player discipline are not on par with those of other professional athletes or employees in other industries.⁴⁰¹

³⁹⁴ *See id.*

³⁹⁵ *See id.*

³⁹⁶ Compare NEW YORK, N.Y., ADMIN. CODE § 14-125, with 2011 NFL CBA, *supra* note 10, at art. 46 § 2.

³⁹⁷ *See* NEW YORK, N.Y., ADMIN. CODE § 14-125; 2011 NFL CBA, *supra* note 10, at art. 46 § 2.

³⁹⁸ *See Report: New NFL Conduct Policy to Borrow from NYPD Playbook*, CBS NEWS (Dec. 10, 2014, 10:52 AM), <http://www.cbsnews.com/news/report-new-nfl-conduct-policy-to-borrow-from-nypd-playbook/> [<https://perma.cc/462R-W2C7>].

³⁹⁹ *See* 2014 PCP, *supra* note 21, at 7.

⁴⁰⁰ *See* 2011 NFL CBA, *supra* note 10, at art. 46 § 2(a).

⁴⁰¹ Compare *supra* Section I.C, with *supra* Section I.D.

In terms of the initial punishment, there is no dispute over whether the Commissioner should have the basic power to impose discipline on players. As discussed, such a power is a fundamental part of not only sports, but in other employment settings as well.⁴⁰² What is an issue, however, is the Commissioner's power to subjectively determine punishment as he sees fit, based on the conduct of the player.⁴⁰³ In the other examples provided, the initial disciplinary power does rest with the commissioner, or supervisor, also, but is different when looking at the entirety of the disciplinary process.⁴⁰⁴

In the other contexts, the players or employees disciplined are provided an opportunity to be heard before discipline is imposed.⁴⁰⁵ In the NFL, such an opportunity to be heard is not provided to the players.⁴⁰⁶ The only due process right explicitly required is notice of the pending punishment,⁴⁰⁷ and not being punished for the same incident twice. Because the NFL is a private labor context though, there is no requirement at all for players to be provided certain due process rights.⁴⁰⁸

In the other contexts, aside from the New York Police Department, the commissioners or supervisors ordinarily do not have the power to appoint themselves as the hearing officer for the player challenging his or her punishment.⁴⁰⁹ This prevents the respective commissioners, or supervisors, from having complete authority over a disciplinary decision. Additionally, although the New York City Police Commissioner does have the power to appoint himself as the hearing officer, there is an additional right provided to the disciplined police officer, granting him or her the right for the opportunity to be heard before punishment is issued.⁴¹⁰ Although the NFL Commissioner may grant such an opportunity to a player before issuing punishment, that opportunity is not a defined right, as

⁴⁰² See *supra* Sections I.B–D.

⁴⁰³ See *supra* Section I.C.

⁴⁰⁴ See *supra* Section I.D.

⁴⁰⁵ See *supra* Section I.D.

⁴⁰⁶ See *supra* Section I.C.1.

⁴⁰⁷ See *supra* Section I.C.1.

⁴⁰⁸ See *supra* Section I.A.2.

⁴⁰⁹ See *supra* Sections I.D.1–3.

⁴¹⁰ See *supra* Section I.D.4.

it is with the NYPD, or even in the MLB or NBA.⁴¹¹ The opportunity to be heard before punishment is issued is a crucial due process right, where an NFL player would be able to possibly mitigate their discipline through an explanation of the situation. And though the NFL player may have the chance to be heard during an appeal of their discipline, the NFL Commissioner may ultimately appoint themselves as hearing officer and uphold his or her own disciplinary determination.⁴¹²

Where this situation gets even trickier is in the fact that courts typically defer to the decision made by an arbitrator. Although NFL players may be able to challenge the impartiality of the arbitrator, such a challenge is difficult to prove, and ultimately, courts are reluctant to overturn the decisions made by arbitrators.⁴¹³ Thus, even in an instance where the NFL Commissioner may give the appearance of impartiality, it would still require a strong showing by a player challenging the Commissioner's impartiality in order for the court to overturn the Commissioner's decision.⁴¹⁴

In tying this all together, the NFL is currently faced with a two-fold problem: first, in determining what rights players should have during the initial punishment process, and during their appeal process; and second, in determining who should decide the initial punishment, how the severity should be determined, and who should hear a player's appeal of the punishment. Balancing the due process rights of the players with the League's desire to protect itself from "conduct detrimental" is an issue that can only be rectified by examining due process rights provided to employees in other labor contexts.

III. PROPOSED SOLUTION

It is likely that we will see some sort of change in the NFL Commissioner's role in the disciplinary process. From March 20 to March 23, 2016, NFL Management and the NFL Players' Association met in Boca Raton, Florida, for their annual meeting to discuss

⁴¹¹ Compare *supra* Section I.C, with *supra* Section I.D.

⁴¹² See *supra* Section I.C.

⁴¹³ See *supra* Section I.C.

⁴¹⁴ See *supra* Section I.C.

various issues concerning the League.⁴¹⁵ Player discipline, and a potential change in the Commissioner's involvement in it, was touched upon during the meeting.⁴¹⁶ Although there were discussions about future change initially, the talks broke down and no agreement was reached.⁴¹⁷ It is still unknown as to whether there will be a change to the Commissioner's role in player discipline moving forward.⁴¹⁸ Nevertheless, it is worth exploring what a possible change could look like, and what it should look like, in the future.

In fashioning a solution as to how the NFL Commissioner's disciplinary power can better account for additional due process rights for the players, it is important to look at the previously mentioned power structures, as well as the ideas proposed by internal members of the NFL.⁴¹⁹ Furthermore, it is also important to not only look at the initial punishment power, but also at the power of the Commissioner in the appeal process. Because the appeal process acts as a limiting function to the authority to impose an initial punishment, both stages impact one another and need to be considered in determining a proper power structure.

Although the examples of disciplinary structures discussed provide a small sample size, it seems that a common theme exists, particularly at the initial punishment stage. At the initial punishment stage, both the sports' commissioners and the employers (or

⁴¹⁵ Key NFL Offseason Dates for 2016, NFL.COM: AROUND THE NFL (Feb. 13, 2016), <http://www.nfl.com/news/story/0ap3000000636092/article/key-nfl-offseason-dates-for-2016> [https://perma.cc/333L-RDZQ].

⁴¹⁶ Ron Clements, *NFL, NFLPA Moving Toward Deal to Strip Roger Goodell of Discipline Authority*, SPORTING NEWS (Mar. 14, 2016), <http://www.sportingnews.com/nfl-news/4698431-nfl-nflpa-near-deal-to-end-roger-goodell-discipline-authority> [https://perma.cc/UP5A-LWW9].

⁴¹⁷ Jim Trotter, *Talks over Roger Goodell's Disciplinary Role Take "Massive Step Backwards,"* ESPN (Mar. 24, 2016), http://espn.go.com/nfl/story/_/id/15053643/talks-nfl-nflpa-reduction-roger-goodell-role-break-down [https://perma.cc/7R5R-4PS6].

⁴¹⁸ Mark Maske, *Little Optimism Remains over Possible Reforms to Roger Goodell's Disciplinary Role*, WASH. POST (Apr. 13, 2016), <https://www.washingtonpost.com/news/sports/wp/2016/04/13/little-optimism-remains-over-possible-reforms-to-roger-goodells-disciplinary-role/> [https://perma.cc/LEB2-8SYN].

⁴¹⁹ See Ken Belson, *Roger Goodell Open to Changing Role in N.F.L. Disciplinary Process*, N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/09/sports/football/roger-goodell-open-to-changing-role-in-nfl-disciplinary-process.html> [https://perma.cc/A4DG-ABYQ]; see generally *supra* Parts I–II.

commissioners) in other industries enjoy a broad range of discretionary power when imposing initial discipline on an employee or player.⁴²⁰ A possible explanation for the broad range of discretionary power afforded to commissioners during the disciplinary process is the idea that companies and organizations want to be able to police their own members.⁴²¹ In enabling the supervisors, managers, and commissioners to handle initial employee discipline, this goal is met.

At the first stage of my proposed solution, I believe that the NFL Commissioner should still be the one to impose initial discipline. The “best interests” clause, and the “conduct detrimental” language that functions as an extension of it, is an integral part of not only the history of commissioner power, but of sports history in general.⁴²² As a matter of fact, such discretionary power at the initial discipline stage is consistent with all four examples discussed above.⁴²³

Starting with MLB in 1921, Commissioner Landis demanded to have the power to take action on behalf of the “best interests” of baseball.⁴²⁴ This broad range of power, which encompasses the power to discipline players, has been included in the various CBAs.⁴²⁵ In the NBA, the same power and language is granted to the Commissioner under the framework of the NBA’s Constitution.⁴²⁶ The Commissioner’s broad power to discipline players has been supported, albeit reduced, in cases such as the Latrell Sprewell incident and the “Malice at the Palace.”⁴²⁷ In the New York City Police Department, the Police Commissioner has the same exclusive power to discipline police officers under the City’s Administrative Code and Charter.⁴²⁸ Although the Code lists examples of behavior that will be disciplined, the section does give the

⁴²⁰ See *supra* Sections I.C–D.4.

⁴²¹ Susan L. Merrill, *Internal Investigations*, SG091 ALI-ABA 91, 114 (2002) (providing a rationale for handling discipline internally).

⁴²² See *supra* Sections I.C–D.2.

⁴²³ See generally *supra* Part II.

⁴²⁴ See *supra* Section I.B.

⁴²⁵ See *supra* Section I.B.

⁴²⁶ See *supra* Section I.D.2.

⁴²⁷ See *supra* Section I.D.2.

⁴²⁸ See *supra* Section I.D.4.

broad phrase “conduct unbecoming of a police officer” which grants the Police Commissioner the power to discipline officers for similar conduct that is proscribed by MLB, NBA, and NFL.⁴²⁹ Lastly, in the UAW–Ford relationship, Ford has the power to discipline employees “for cause.”⁴³⁰ Although some examples are provided in the company guidelines, “for cause” is broad, and is worded so that management cannot discipline an employee arbitrarily.⁴³¹ The “for cause” standard requires that the employee engage in some form of conduct that would warrant discipline, similar to the “conduct detrimental [to the NFL]” provision.

Additionally, the NFL’s “conduct detrimental” standard, and the Commissioner’s disciplinary power, have been supported when independent hearing officers have reviewed it. The power has been upheld in court,⁴³² it is language that the player unions have agreed to in bargaining through all three major sports,⁴³³ and that power should continue to be a part of the NFL Commissioner’s job.

A change that I do recommend at the initial stage is the inclusion of the right to a hearing before the commissioner imposes discipline, as modeled from the NYPD’s handling of misconduct by an officer.⁴³⁴ As of now, the Commissioner in the NFL must simply meet a notice requirement in informing the player and NFLPA of the discipline within the time specified.⁴³⁵

I would, however, retain the Commissioner’s Exempt List in place under the current Personal Conduct Policy. The concept of providing an opportunity to be heard before a final punishment, while simultaneously placing the player on leave with pay during the investigation, are not mutually exclusive ideas. As seen in the Rice, Hardy, and Peterson situations, it is possible to temporarily suspend players with pay while ultimately providing them with an

⁴²⁹ See *supra* Section I.D.4.

⁴³⁰ See *supra* Section I.D.3.

⁴³¹ See *supra* Section I.D.3.

⁴³² See *supra* Part I.

⁴³³ See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a); 2012 MLB CBA, *supra* note 8, at art. XII § B; NBA Constitution, *supra* note 269, at art. 35 §§ (c)–(d).

⁴³⁴ See NEW YORK, N.Y., ADMIN. CODE § 14-115(b) (2015).

⁴³⁵ See 2011 NFL CBA, *supra* note 10, at art. 46 § 1(a).

opportunity to be heard prior to imposing the final punishment.⁴³⁶ Ultimately, under my proposal, the Commissioner would need to provide the player with an opportunity to be heard before issuing punishment, while also placing the player on paid leave via the Commissioner's Exempt List, which would add a step to the initial punishment stage.

A possible alternative to the Commissioner being the sole person empowered with discretionary power in imposing punishments would be to designate a person, mutually agreed upon by the players and the League, to decide punishment issues. Although the CBA's language does provide for something similar to that in Article XLVI, by granting the Commissioner the authority to delegate, there is not a requirement in granting exclusive power to such a designated person.⁴³⁷ Out of the examples discussed above, the closest thing to having such a person comes from the NFL itself, with the "disciplinary officer" in the Personal Conduct Policy. As discussed above though, the Commissioner does not need to delegate the discipline decision to the officer, and when he does not, the officer's recommendation is exactly that: a recommendation. Having such a designated person is not a foreign concept, as this is something that Commissioner Goodell has actually mentioned himself.⁴³⁸

Ultimately, at the initial punishment stage, it seems best to keep the NFL Commissioner's power to govern in the best interests of the League intact. The Commissioner represents, at least in theory, an unbiased party looking out for the League as a whole, not any one particular team. Additionally, by enabling the Commissioner to handle the disciplinary decisions, player conduct is policed from within, by an individual who has experience in disciplinary matters. Although an agreed-upon third party with the exclusive power to impose initial discipline could be possible, such an arrangement has never been done before in any of the industries

⁴³⁶ This allows the League to complete a thorough investigation prior to issuing punishment so one does not end up with a situation similar to that of Rice where the suspension is increased after new evidence comes to light.

⁴³⁷ See generally 2011 NFL CBA, *supra* note 10, at art. 46.

⁴³⁸ See Belson, *supra* note 419.

discussed above.⁴³⁹ Nevertheless, Commissioner Goodell has admitted recently that he would be open to vesting the initial discipline power in such a way.⁴⁴⁰

Although the initial punishment policy under my solution would remain relatively the same, the appeal procedure would not. Granting the Commissioner the power to not only impose the initial punishment, but then to appoint himself as the person to hear the appeal, does not seem to encourage impartiality in the appeal process.⁴⁴¹ Because he will already have ruled on the punishment, he is likely to be pre-disposed to a particular judgment on the appeal. Enabling a new person—or people, in a panel of hearing officers—to oversee the appeal will provide for a second party, who was not involved in the initial decision, and thus will likely be less influenced by the prior punishment when making a final determination.

A panel of hearing officers would be comprised of three members: one selected by the NFLPA, one selected by the League, and a third arbitrator jointly selected by the parties, in a manner that is similar to the MLB and NBA.⁴⁴² A list provided by a major arbitration agency, such as the American Arbitration Association, would be given to both parties, and each party would cross off arbitrators on the list, one-by-one, until a final arbitrator remained; if they could not agree on that final arbitrator, then the two selected arbitrators would be the ones to agree on the third. The panel would hear all appeals regardless of the source of the disciplinary power. In the MLB, each side selects one of the three arbitrators, and the parties agree on the third. In the NBA, only one arbitrator, who is also mutually-agreed upon, handles the appeals.⁴⁴³

The arbitration panel would serve for the duration of one season, though all three members may be reelected at the start of the next season. In both the NBA and MLB though, either party can fire the mutually agreed upon arbitrator during a set period of time.⁴⁴⁴ This presents both sides with the opportunity to prevent

⁴³⁹ See *supra* Sections I.C–D.

⁴⁴⁰ See Belson, *supra* note 419.

⁴⁴¹ Compare *supra* Section I.C, with *supra* Section I.D.

⁴⁴² See *supra* Sections I.D.1–2.

⁴⁴³ See *supra* Section I.D.2.

⁴⁴⁴ See *supra* Section I.D.2.

an unfair arbitrator constantly upholding disciplinary decisions, or constantly overturning decisions. The NBA incorporates a slightly different approach than the MLB, because the NBA Commissioner retains the power to hear appeals for minor disciplinary decisions.⁴⁴⁵ Such a situation could be possible moving forward in the NFL, if the players were to agree to it.

By having a panel of three hearing officers, with a designated, and mutually agreed upon, impartial third officer, the player filing the grievance would be provided a more unbiased hearing. Though members of both the NFLPA and the Owners have considered changing the Commissioner's power at the initial stage, they have not looked to do so at the appeal stage.⁴⁴⁶ The Commissioner himself, as discussed before, has admitted to being open to such a reduction of his initial punishment power, but was dismissive of relinquishing his appeal power to a neutral arbitrator.⁴⁴⁷ Despite this, the League will continue to face pressure to change the appeal process as other sports have implemented a neutral arbitrator to handle disciplinary appeals.

By allowing each side to appoint their own arbitrator, and then agreeing upon the third, disputes can be handled by people who are inside the business. In such a scenario, the people who are making the appeal decisions are close enough to the goings on of the NFL to understand the ramifications of their decisions, how the player's conduct conforms to the League, and how that type of conduct has usually been handled. By having an internally experienced panel, decisions can be made more efficiently, and the appeal process will be run more smoothly. Additionally, rather than having the grievance processed outside the NFL, or having the Commissioner be the "judge, jury, and executioner," the three-member panel provides an objective body to hear grievances.

The three-member panel would have the authority to affirm a punishment, reduce it, or eliminate it entirely. The ability to impose punishment, as stated above, would belong exclusively to the Commissioner, so the panel would not be enabled to increase a

⁴⁴⁵ Compare *supra* Section I.D.2, with *supra* Section I.D.1.

⁴⁴⁶ See generally Belson, *supra* note 419.

⁴⁴⁷ See *id.*

player's discipline. Under my proposal, the decision of the three-member panel would be final and binding on both parties, though either side would have the right to bring a claim in court over a procedural error, or if the panel overstepped their authority in deciding a grievance.

The three-member panel would have the same authority as the arbitration panels in the UAW-Ford agreement, the MLB, and the NBA. As seen in the Latrell Sprewell incident, the Commissioner does have the broad power to discipline a player, but the Grievance Arbitrator can reduce punishment down to what is fair and reasonable given the circumstances. Such a power to be able to cap the Commissioner's disciplinary power, much like with Ford, MLB, and NBA, belongs in the NFL.

CONCLUSION

With the various avenues that the Commissioner can discipline players—Constitution, CBA, Personal Conduct Policy, and UPC—it is important to nail down why his power exists under each. Under the CBA, Personal Conduct Policy, and UPC, the Commissioner would maintain his current broad disciplinary power. This makes sense because he is unbiased in the sense that his loyalty is to the NFL as a whole rather than to an individual franchise, and discipline under the aforementioned sources seeks to eliminate potential conduct that would negatively impact the League as a whole.

In order to limit the Commissioner's power, the grievance procedure proposal does remove the Commissioner's power to oversee appeals on which he rendered an initial punishment. That type of authority, aside from the NYPD, is basically unheard of. None of the MLB, NBA, or Ford managers are provided such an expansive role in the appeal process. By eliminating that power, and implementing a three-member panel to hear player grievances, the policy of handling disputes internally is maintained, while an objective body, unrelated to the initial punishment, is the deciding body of the appeal.